SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. _____

RADIO STATION WOW, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, DE E. BRADSHAW, ET AL., PETITIONERS,

vs.

HOMER H. JOHNSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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[fols. 1-2] [Caption omitted]

[fol. 3]

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

HOMER H. JOHNSON, Plaintiff,

vs.

RADIO STATION WOW, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, a Corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Stanley C. Holston and John J. Gillin, Jr., Defendants

PETITION IN EQUITY—Filed November 23, 1942

Comes now the plaintiff on behalf of himself and all other members of Woodmen of The World Life Insurance Society, and for cause of action against the defendants, alleges that:

1. Defendant Woodmen of The World Life Insurance Society, hereinafter described as the Society, is now and has been since 1890 a corporation organized and existing under the laws of the State of Nebraska as a fraternal beneficial [fol. 4] association, with its principal office in Omaha, Douglas County, Nebraska, and organized and existing for the sole benefit of its members and their beneficiaries. The Society has a membership of more than 400,000 members, assets of more than $127,000,000.00 and insurance in force of more than $350,000,000.00.

2. Plaintiff is now and has been for many years a member in good standing of the Society and is entitled to all the rights, privileges and benefits of membership in the Society.

3. Defendant Radio Station WOW, Inc., is now and has been since October 3, 1942 a corporation organized and existing under the laws of the State of Nebraska, with its principal office in Omaha, Douglas County, Nebraska.

4. The individual defendants, except Gillin, are now and have been during the time hereinafter mentioned, officers of the Society, as follows: De E. Bradshaw, President; T. E. Patterson, Vice President; Farrar Newberry, Secretary; William Ruess, Chairman of Auditors; W. C. Braden,

Auditor; R. E. Miller, Treasurer, and Stanley C. Holston, Escort. Said defendants are also the members of the Board of Directors of the Society. There are other members of the Board of Directors, but they are non-residents of and absent from the State of Nebraska. The Board of Directors of the Society is vested with the control and management of the Society's business and affairs, except during the few days that its sovereign camp is in session every two years. The last session of the sovereign camp ended in July, 1941. The defendant officers have at all times hereinafter mentioned and do now dominate and control the management and affairs of the Society.

[fol. 5] 5. In 1923 the Society established and commenced operation of Radio Station WOW at Omaha, Nebraska. Three years later the call letters of the station were changed to WOW. The station has broadcast upon a frequency of 590 kilocycles since June, 1936 and with power ranging from 500 watts as its beginning to 5,000 watts at the present time. The frequency granted to the station is particularly desirable due to increased range and clarity of broadcasts by comparison to broadcasts at higher frequencies with equivalent or greater power. The effective day and night range of the Station's broadcast is at least two hundred miles from Omaha in all directions. The listening audience, as revealed by surveys, is included in areas having a combined population of more than 4,000,000 persons. The station has been affiliated with the National Broadcasting Company since October, 1927. Its frequency, power, effective range, listening audience and its National Broadcasting Company contract make it an especially desirable station. For many years last past the station has had an excellent reputation and standing throughout the United States, and is known as one of the leading stations of the United States. For many years, an announcement was made over the station at least several times a day that the station was owned and operated by the Society and it has become generally known throughout the United States, and particularly among the members of the Society, as being owned and operated by the Society. By reason of the foregoing, the station has developed an excellent name and reputation as a representative of the Society and has thereby created good will for the Society.

6. The operation by the Society of station WOW is now and has been for many years extremely profitable. The [fol. 6] records of the Society show the receipts, disbursements and net income from the station since 1937, to be as follows:

Year	Receipts	Disbursements	Net Income
1937	$433,207.24	$238,421.91	$194,785.33
1938	474,635.98	304,960.25	169,675.73
1939	514,042.26	346,517.07	167,525.19
1940	559,002.39	381,517.40	177,484.99
1941	601,593.23	391,263.96	210,329.27
1942 (Estimated)	649,609.48	370,967.94	278,641.54

The foregoing figures for 1942 are estimates based on the Society's records of receipts and disbursements for the first nine months of the year and assuming they continue at approximately the same rate during the last three months of the year.

7. Included in the disbursements set forth in the foregoing paragraph are salaries of the defendant Gillin as manager of the station and salaries of the officers of the Society as follows:

Name	1937	1938	1939	1940	1941
De E. Bradshaw, President	$15,000	$15,000	$15,000	$15,000	$15,000
John J. Gillin, Jr., Manager	6,704	8,800	11,000	13,168	15,124
William Ruess, Chm. of Auditors	5,000	5,000	10,000	10,000	10,000
Farrar Newberry, Secretary	.....	2,500	5,000	5,000	5,000
Rainey T. Wells, General Counsel	.....	5,000	5,000	5,000	5,000

8. Plaintiff is informed and believes that the amount of the salaries paid to the aforesaid officers has in some instances been increased for the year 1942. In addition to such [fol. 7] salaries, very liberal allowances have been made to some of the officers for expenses, including $16,000.00 to defendant Gillin for the year 1942. The duties of the officers named, except defendant Gillin, required them to devote only a comparatively small part of their time to the station affairs. Such salaries and allowances are excessive and unreasonable. If excessive salaries and allowances were not paid, the annual net income of the station would exceed $300,000.00 and, as appears from the schedule of earnings heretofore set forth, the income of the station has steadily increased for many years, but the expenses have greatly increased, thus absorbing a large part of the increased income. The fact that excessive salaries have been paid to

the officers as aforesaid, the aggregate of which have been more than doubled since 1937, accounts for a substantial part of the increase of expenses. In addition to the salaries paid to defendant officers from the earnings of the radio station as aforesaid, defendant officers have received salaries from the Society as follows:

Name	Salary from Station	Other Salary from Society	Total Salary
De E. Bradshaw, President	$15,000	$35,000	$50,000
Farrar Newberry, Secretary	5,000	15,000	20,000
Rainey T. Wells, General Counsel	5,000	15,000	20,000
William Ruess, Chm. of Auditors	10,000	5,000	15,000

9. Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants, in violation of their duties as Officers of the Society and the [fol. 8] trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of radio station WOW for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose, the individual defendants did and caused to be done the following acts:

(a) On August 31, 1942, a resolution was adopted by the Board of Directors of the Society authorizing defendant Bradshaw to negotiate a sale or lease, or lease and sale, subject to the lease; of the radio station property and assets other than cash and accounts above $25,000.00.

(b) On October 3, 1942, defendant Radio Station WOW, Inc. was organized under the laws of the State of Nebraska for the purpose of engaging in the business of Radio broadcasting with an authorized capital of $2,000.00 divided into 2,000 shares of the par value of $1.00 each, of which 750 shares are preferred stock, Class A, 250 shares are preferred stock, Class B, and 1,000 shares are common stock. Notwithstanding the fact that the par value of the preferred stock is only $1.00 a share, its holders are entitled to receive an annual dividend of $7.00 a share, it is redeemable at the option of the Board of Directors at $100.00 a share and upon dissolution, its holders are entitled to be paid $100.00 a share before any distribution is made to common stockholders.

(c) Those named in the articles of incorporation as incorporators were defendant Gillin, Guy C. Myers, M. M. Meyers, Harvey E. Milliken, Francis P. Matthews, J. J. Isaacson, Thomas J. Wallace and Robert Samardick. The incorporators were also named as directors of the company, and defendant Gillin was named as president, Guy C. Myers vice president, M. M. Meyers secretary and Harvey E. Milliken treasurer.

[fol. 9] (d) On October 3, 1942, defendant Bradshaw, on behalf of the Society, entered into a purported written lease with defendant Gillin on behalf of defendant Radio Station WOW, Inc. whereby the Society leased to defendant Radio Station WOW, Inc. all of the property then in use by radio station WOW for broadcasting, for a period of fifteen years for a rental of $8,166.00 per month for the first three years and the sum of $5,680.00 per month during the last twelve years of the term of the lease. The provisions of said lease do not adequately protect the Society and are extremely favorable to defendant Radio Station WOW, Inc. Said lease further provided that the Society transferred to defendant Radio Station WOW, Inc. all of its contracts with the National Broadcasting Company and other firms, partnerships and corporations with reference to broadcasting commercial or other programs and also the net accounts due for commercial broadcasting then accrued in the amount of $25,000.00. Said lease further provided that the Society transferred to defendant Radio Station WOW, Inc. all of its good will. Said lease further provided that it was to become effective and its term commence when the Federal Communications Commission granted to defendant Radio Station WOW, Inc. a license to operate said radio station.

(e) On or about October 7, 1942, an application was filed with the Federal Communications Commission of the United States of America by defendant Bradshaw on behalf of the Society and defendant Gillin on behalf of defendant Radio Station WOW, Inc., requesting consent to the assignment by the Society to defendant Radio Station WOW, Inc. of the license of radio station WOW. The reason given for such assignment was that the Society was convinced that defendant Radio Station WOW, Inc. would "continue to [fol. 10] serve the public by rendering a high type pro-

gram service". The application stated the ownership of stock in defendant Radio Station WOW, Inc. was as follows:

John J. Gillin	250 Class B, Preferred	100%
	100 Class A, Preferred	13.3%
	350 Common	35%
Guy C. Myers	250 Class A, Preferred	33.3%
	250 Common	25%
Francis P. Matthews	100 Class A, Preferred	13.3%
	100 Common	10%
Thos. J. Wallace	100 Class A, Preferred	13.3%
	100 Common	10%
Harvey E. Milliken	50 Class A, Preferred	6.6%
	50 Common	5%
M. M. Meyers	50 Class A, Preferred	6.6%
	50 Common	5%
J. J. Isaacson	50 Class A, Preferred	6.6%
	50 Common	5%
Robert Samardick	50 Class A, Preferred	6.6%
	50 Common	5%

The application stated that defendant Gillin would continue to be general manager of the station and no changes in staff were contemplated. The application further stated that the officers, directors and stockholders of Radio Station WOW, Inc. were "public spirited citizens representative of the best interests of WOW's audience". The application also stated that the reason for the proposed assignment of the license of the radio station was that Radio Station WOW, Inc. "expects to continue to render the same high grade service that WOW has given its listeners heretofore". Said application is now pending before the Federal Communications Commission and objections to the granting of consent to the aforesaid assignment of the radio station without a public hearing have been made by Hon. Dan Butler, mayor of the City of Omaha, Nebraska, for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska.

10. No reasons have been disclosed for the leasing of the radio station other than set forth in the aforesaid application and such reasons are obviously insufficient. The station has been exceedingly and increasingly profit- [fol. 11] able despite excessive salaries paid to officers thereof, as heretofore alleged. The aforesaid lease is for a grossly inadequate rental and to a lessee without adequate financial responsibility. As heretofore alleged, the station is now earning a net income at the rate of approximately $300,000.00 a year, but notwithstanding that fact, it is being leased for a rental of approximately $97,000.00

a year for three years and approximately $68,000.00 a year for the next twelve years. The total rental payable for the entire term of the lease is $3,388,104.00 less than the net income from the station would be during such period if such income continued at the present rate of approximately $300,000.00 a year. Not only would the Society thus lose $3,388,104.00 during the term of the lease, but in addition, the lease provides that the Society transfer without limitation as to time the good will of radio station WOW and $25,000.00 of net accounts due the Society. The good will of radio station WOW is an extremely valuable asset of the Society, and no reason is disclosed for the apparent gift of good will and $25,000.00 of net accounts by the Society to defendant Radio Station WOW, Inc.

11. The authorized capital of defendant Radio Station WOW, Inc, is only $2,000.00, and it is authorized to commence business with $1,000.00 capital. No other corporation or individual appears to be in any way liable for the payment of the rent named in the lease, and there is no assurance that rent beyond the present capital will be paid. It is apparent that even though the lease of the station were desirable, which plaintiff denies, a lease to defendant Radio Station WOW, Inc. with its nominal financial responsibility would be most unwise and improvident. If for any reason the earnings of the station should decline to a point where the payment of the rental named in the lease would be unprofitable for defendant Radio Station WOW, Inc., it can then cause the lease to be terminated [fol. 12] and the station returned to the Society for operation with its earnings thus reduced. The lease is aptly described by paraphrasing a familiar saying to "heads Radio Station WOW, Inc. wins, tails the Society loses".

12. Defendant Radio Station WOW, Inc. is dominated and controlled by men who have been and now are directly or indirectly connected with the Consumers' Public Power District of Nebraska, or are personally interested in its acquisition of the power facilities serving Omaha, Nebraska and vicinity which are now owned and operated by the Nebraska Power Company. In the event such power facilities are acquired by the Consumers' Public Power District, it is believed the purchase price will be approximately $40,000,000.00 and the funds for the payment thereof will be

raised by the sale of bonds issued by such District. The interest of some of the parties connected with this transaction may be described as follows:

(a) Defendant Bradshaw's son-in-law, John B. Dawson, is a lawyer residing in New York City with his office at 48 Wall Street. He has been handling legal matters for the companies engaged in the sale of bonds issued by the Consumers' Public Power District in connection with its acquisition of power facilities, and is expected to render similar services if such power facilities in Omaha are acquired by Consumers' Public Power District. The companies engaged in the sale of such bonds will receive a large amount for their services in selling such bonds. The amount is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00. Defendant Bradshaw has strongly urged the aforesaid sale of such power facilities, and he, together with other officers of the Society, [fol. 13] recently resigned from the Omaha Chamber of Commerce because they disapproved its opposition to such sale.

(b) Defendant Gillin is president, director and the largest stockholder of defendant Radio Station WOW, Inc., and he is to become the manager of the station for that company. He has for many years been the manager of radio station WOW for the Society and a protege and close associate of defendant Bradshaw.

(c) Guy C. Myers, Vice President, director and second largest stockholder of defendant Radio Station WOW, Inc. resides near New York City, with his office at 35 Wall Street, New York City. He is now and has been for the past several years engaged in promoting the sale of various power facilities to Consumers' Public Power District, including those now owned and operated by Nebraska Power Company at Omaha, Nebraska. Myers receives a compensation for such services a contingent fee in the form of a commission based on the purchase price of the facilities acquired. The amount of such commission, in the event he makes a sale of the Omaha facilities, is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00.

(d) Francis P. Matthews, Vice President, director and large stockholder of defendant Radio Station WOW, Inc.,

resides in Omaha where he is now and has been for many years engaged in the practice of law and is attorney for Consumers' Public Power District.

(e) M. M. Meyers, Secretary, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is engaged in the business of buying and selling bonds and he is to participate in the sale of bonds issued [fol. 14] by the Consumers' Public Power District in the event it acquires the facilities of the Nebraska Power Company in Omaha, Nebraska.

(f) Harvey E. Milliken, treasurer, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is engaged in the printing business. The printing company with which he is associated has for many years done a large volume of printing for the Society. He has for many years been a close personal friend of defendant Bradshaw and has favored and urged the sale of the aforesaid power facilities to Consumers' Public Power District.

Other persons whose names are unknown to plaintiff are interested in deefndant Radio Station WOW, Inc. and in its operation of station WOW and in the benefits and profits therefrom. The obvious purpose of the leasing of the station as aforesaid is to make the radio station available to the Consumers' Public Power District and those interested in its acquiring such power facilities for spreading propaganda favoring such sale. The sale of such power facilities affects only a small part of the membership of the Society and the use of the station to sponsor such sale is contrary to the objects and purposes of the Society and to the best interests of the Society and its members and to the listeners of the station and to the public generally.

13. Defendant officers of the Society did not, prior to the execution of the aforesaid lease, disclose to the Society's members the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single assets of the Society for a grossly inadequate consideration and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facili- [fol. 15] ties to the Consumers' Public Power District as aforesaid.

14. By reason of the foregoing facts, the aforesaid lease of the radio station WOW from the Society to defendant Radio Station WOW, Inc. is illegal and void and should be immediately concelled and terminated by the court and the defendants enjoined from leasing, selling or otherwise disposing of the radio station.

15. At all times herein mentioned, the Board of Directors of the Society has been dominated and controlled by the defendant officers and such officers have participated in the wrongful and unlawful acts herein complained of. Plaintiff has made no demand on defendant officers and the Board of Directors for the reason that such demand would have been futile and of no avail because of the participation of such officers and directors in the wrongful and unlawful acts herein complained of. No demand has been made on the sovereign camp of the Society because it has not been in session since July, 1941 and the next regular meeting of such camp is not to be held until the summer of 1943.

16. Plaintiff and the other members of the Society have no adequate remedy at law and plaintiff and such members will suffer great and irreparable loss and injury unless relief is granted by this court.

Wherefore, plaintiff, for himself and all other members of the Society, pray that the aforesaid lease and assignment of license by the Society of its radio station to defendant Radio Station WOW, Inc. be declared illegal and void and the aforesaid lease and assignment be immediately cancelled and terminated; that the defendants be enjoined from transferring by lease, assignment or otherwise, radio station WOW or its license thereto; that the defendant officers of the Society be ordered to pay to the Society all expenses in-[fol. 16] curred in connection with the aforesaid lease and assignment; that plaintiff recover his costs and expenses incurred in connection with this action from the defendants, and for such other, further and different relief as equity and justice may require.

Homer H. Johnson, Plaintiff, by Ralph W. Slocum, Stewart, Stewart & Whitworth, His Attorneys, 1412 Sharp Bldg., Lincoln, Nebraska.

Duly sworn to by Homer H. Johnson. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 17] IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

SEPARATE ANSWER OF THE DEFENDANTS WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER AND STERLING C. HOLSTON—Filed January 28, 1943

Come now the defendants, Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston, and for their separate answer to plaintiff's petition allege:

1. Defendants allege that the plaintiff has not legal capacity to sue and maintain this action, for the reasons that the transaction and subject of the action is one exclusively within the original jurisdiction of the Insurance Commissioner of the State of Nebraska and the Attorney General of the State of Nebraska. In this behalf defendants allege that the Insurance Commissioner has not presented the facts relating thereto to the Attorney General, the Attorney General has not given notice to the chief executive officers of Woodmen of the World Life Insurance Society with reference thereto, and of his intention to institute proceedings by reason thereof, unless for good cause it be shown that said proceedings should not be commenced, and the Attorney General of the State of Nebraska is the sole proper party plaintiff to institute and maintain said action, all as provided by Sections 44-1255, 1256 Neb. 1941 Sup.

[fol. 18] 2. As to paragraph 1 of the petition, defendants admit the allegations thereof, except that they allege that Woodmen of the World Life Insurance Society was incorporated in 1891, allege that the Society has a membership of approximately 336,000, allege that it has assets of approximately 136 million dollars, and except further that they allege that the Society has insurance in force of approximately 367 million dollars.

3. As to paragraph 2 of the petition, defendants admit the allegations thereof and allege that plaintiff became a member of the Society on February 10, 1909.

4. As to paragraph 3 of the petition, defendants admit the allegations thereof.

5. As to paragraph 4 of the petition, defendants admit the allegations thereof, except that at all times mentioned in the petition and that now they as officers have dominated and controlled, or now dominate and control the management and affairs of the Society, which they expressly deny. Defendants further allege that the true name of the defendant Holston is "Sterling C. Holston."

6. As to paragraph 5 of the petition, defendants admit the allegations thereof.

7. As to paragraph 6 of the petition, defendants deny the allegations of fact therein contained. Defendants further allege that the receipts of radio station WOW (less all commissions and discounts), the disbursements and net income (before depreciation and expense of construction, furniture and fixtures) for the years 1937 to 1942, both inclusive, are as follows:

[fol. 19]

Year	Receipts	Disbursements	Net Income
1937	$409,511.94	$204,880.63	$204,631.31
1938	450,389.44	276,220.30	174,169.14
1939	493,130.66	322,477.09	170,653.57
1940	529,887.87	347,855.35	182,032.52
1941	581,297.02	368,489.64	212,807.38
1942	652,303.63	364,865.89	287,437.74

8. As to paragraph 7 of the petition, defendants admit the allegations of fact therein contained.

9. As to paragraph 8 of the petition, defendants admit that the income of the station has increased during the years 1937 to 1942, both inclusive, during which period the disbursements incident to the operation of the station have likewise increased, admit that the salaries paid to the defendant officers names from the radio station, other salaries from the Society, and their total salaries, was and is as set forth in paragraph 8 of the petition, and deny each and every remaining allegation of fact in said paragraph 8 of the petition set forth.

10. As to paragraph 9 of the petition and the several subdivisions thereof, defendants admit subdivision (a) thereof; defendants admit subdivision (b) thereof and with reference thereto, upon information and belief allege that

the incorporators and stockholders of said corporation paid substantially in excess of par for the preferred stock and further admit subdivision (c) of said paragraph 9 of the petition.

(a) Defendants further admit the allegations of fact contained in subdivision (d) of paragraph 9 of the petition, except that said lease was a purported lease, which is denied, and in this behalf allege that said lease was in writing, entered into in good faith, to which further reference will be made, that a true copy of said written lease is hereto [fol. 20] attached to this answer, marked Exhibit 1, and made a part hereof.

(b) Defendants further admit the allegations of fact contained in subdivision (e) of paragraph 9 of this petition, except "said application is now pending before the Federal Communications Commission." In this behalf defendants allege that by virtue of orders of the Federal Comunications Commission entered on December 15, 1942, and on January 12, 1943, said joint application was in all respects approved, the Society and Radio Station WOW, Inc. authorized and directed to effectuate and perform said assignment, by reason of which and by virtue of the provisions of said lease, Exhibit 1, possession of the leased property was delivered by the Society to Radio Station WOW, Inc. on January 14, 1943, which lessee is now in possession of and operating the same, under and by virtue of the provisions of said lease.

(c) These defendants deny each and every remaining allegation of paragraph 9 of the petition.

11. (a) Defendants admit that the radio station is leased for a rental of approximately $97,000.00 a year for the first three years, for approximately $68,000.00 a year for the last twelve years, that by the terms of the lease accrued net accounts in the amount of $25,000.00 were conveyed to the lessee, for the reasons hereinafter set forth, and deny each and every remaining allegation of fact in said paragraph 10 contained.

(b) Defendants further deny each and every remaining allegation of paragraph 10 of the petition not heretofore expressly admitted to be true.

(c) Defendants further allege that the Society is and at all times has been a fraternal beneficiary society, operating without profit and for the sole benefit of its members. [fol. 21] The radio station was originally established in 1923 in the pioneer days of radio as an incidental means of advertisement of the benefits of the Society and by reason thereof for the general benefit of its members, though the station operated for the first six years at a loss.

(d) Defendants further allege that subsequently the radio field rapidly grew to its present national and international extent and became a distinct and separate field of endeavor requiring special skill and training in the ownership, operation and management of an extensive, intricate and highly competitive character in a distinct and separate field of business involving increasing and special hazards, all of which was separate, distinct and of a different character than the operation of a fraternal beneficiary life insurance soci-ty.

(e) Defendants further allege that by reason of such developments in the radio field generally and of radio station WOW specifically, the time, the attention and supervision of the officers and directors of the Society have increasingly been required to be devoted to the radio station in a wholly disproportionate proportion of their time, attention and supervision, required to be devoted to the principal object for which the Society was organized and is operated, and that for several years past consideration has been given to a favorable disposition of the radio station, to the end that the officers and directors of the Society should devote their entire and exclusive effort to the operation and extension of the Society as a fraternal beneficiary life insurance association.

(f) Defendants further allege that the development of the radio station in recent years has required an unreasonable and disproportionate amount of time and effort of [fol. 22] the officers and directors of the Society, not within the principal object and purpose of the Society. Matters requiring exclusive and immediate attention of the officers and directors of the Society have resulted in definite interference in the performance of their duties and supervision of the principal object of the Society as a fraternal beneficiary life insurance association. Substantial diffi-

culties have arisen with reference to the supervision and compensation as between the employees of the Society whose duties were confined exclusively to the life insurance operations of the Society and those employees of the radio station whose duties were confined exclusively in the operation of the radio station. The supervision and control of the radio station conferred upon the Federal Communications Commission and the exercise of that supervision and control, required constant and continuous attention of the officers and directors of the Society, contrary to the principal purpose and object of the Society as a fraternal beneficiary life insurance association. By virtue of the developments in the radio field, particularly in the establishment of other radio stations, with equal or greater power than radio station WOW, the available listening audience of the members of the Society has been limited and restricted to a small percentage of the members of the Society in geographical extent throughout the United States and Canada, and to such extent the original object and purpose of the establishment of radio station WOW as a means of communication and contact between the Home Office and the individual members of the Society has been substantially eliminated. Proposals have been made to subject the property and earnings of the radio station to both State and Federal taxes, which if adopted and enacted would limit the earnings of the radio station to such a degree as to make it [fol. 23] inadvisable to continue the operation of the radio station commensurate with the business hazard that would result therefrom and the possible involvement of the immunity of the Society from taxes as a fraternal beneficiary association in its life insurance operations. Under the laws of the United States of America and the rule and regulations of the Federal Communications Commission the radio station as such has a quasi-public character, opportunity for broadcast time must be made equally available for the presentation of diverse views upon public and political questions, which has not contributed to the continuance of wholly favorable public relations in connection with the principal object of the Society as a fraternal beneficiary life insurance association. There have been proposals that the government of the United States should acquire the ownership and operation, or the right of operation of all radio stations, including radio station WOW, in event it was believed by the officers and directors that the

Society would not be able to make so favorable a disposition of the radio station as under the exercise of its private right to sell or lease the same.

(g) Defendant further allege that all of these and other matters were taken into consideration by the officers of the Society and the Board of Directors as a whole, for which reasons it was some years ago determined that the Society should at an appropriate time make such disposition of the radio station as would eliminate the involvement and hazard attendant upon the ownership and operation of the sante, and that such disposition should be made as would result for the best interests of the Society and each [fol. 24] and all of its members, including the plaintiff herein.

(h) Defendants further allege that in negotiations continued over a substantial period of time, it developed and was determined that an outright sale of the radio station was not feasible and could not be made because prospective purchasers would not make an immediate investment of cash capital to acquire the outright title to the property because of the unfavorable tax situations limiting the return upon such investment and incident to the hazards of the ownership and operation of the radio station.

(i) Defendants further allege that taking all of these and other factors into consideration and after the progress of attempted negotiations for the sale or lease, or sale and lease of the radio station over a substantial period, the officers and the whole of the Board of Directors, in good faith, acting solely for and in behalf of the best interests of the Society and its members, with no personal interest therein, directly or indirectly, presently or under any conditions or circumstances to be acquired, unanimously authorized and approved the lease of said radio station to the defendant Radio Station WOW, Inc., a copy of which lease is hereto attached, marked Exhibit 1, and made a part hereof. Defendants allege that said lease is upon adequate and favorable consideration, for a lawful purpose and that is was duly authorized by the whole of the Board of Directors of the Society, duly executed and delivered by its officers, and that possession of the leased property has been delivered to the lessee thereof, all in accordance with the statutes of the State of Nebraska, the

articles of incorporation and the constitution and by-laws [fol. 25] of the Society, the action of the Sovereign Camp, the action of the Board of Directors, the action taken thereunder by the officers of the Society, and in conformity with the orders of the Federal Communications Commission.

(j) In this behalf defendant alleges that a further factor taken into consideration by the officers and directors of the Society in connection with said lease, was that the radio station occupied a substantial amount of space in the Insurance Building, the home office building of the Society located at 17th and Farnam Streets, Omaha, Nebraska, and that in connection with and as a part of said lease of the radio station said space was by separate lease rented to defendant Radio Station WOW, Inc., for an additional consideration of approximately $450,000.00, which assured the occupancy of said space and assured income therefrom over a 15 year term, which was of an additional and substantial benefit to the Society and its members, including the plaintiff herein.

(k) Defendants further allege that though the par value and authorized and paid up capital stock of the defendant Radio Station WOW, Inc. is $2,000.00, that the cash surplus paid in by the incorporators thereof, in addition to the purchase price of the capital stock at par thereof, was $73,500.00.

(l) Defendants further allege that the accrued accounts in the amount of $25,000.00 transferred by the Society to the defendant Radio Station WOW, Inc., under and by virtue of the terms of the lease, were not a gift nor the dissipation of any of the assets of the Society, that said accounts were taken into account as a portion of the consideration to be paid by the defendant Radio Station WOW, [fol. 26] Inc. for the rent of the radio station and for the rent of space in the Insurance Building, both over a period of 15 years, and for the further purpose of making available to said defendant further cash working capital to immediately take over and operate said station and to further assure its financial standing and stability, all of which was for the best interests of the Society and its members, including the plaintiff herein.

(m) Defendants further allege that under and by virtue of the terms of the lease, Exhibit 1, the Society and its members, including the plaintiff herein, were and are assured of all possible legal protection in the continued maintenance of the leased property in proper condition, in the acquisition and installation at the lessee's expense, of all new equipment, machinery and devices necessary or desirable in the maintenance of standard and progress of the radio station, in the protection of the leased property by insurance against all reasonable hazards, and in the unconditional return of the property to the Society, including subsequent acquisitions, upon the termination of the lease, or within thirty days after any default by the lessee under the terms of the lease, in the limitation of salaries and expenses, in provisions for prepayments of considerations to become due under the lease, in requirement for the making and maintenance of proper records and the right reserved to the Society to a monthly examination thereof, in the further and usual provision for a return of the property to the Society within 90 days in the event that the lessee should be charged with bankruptcy or insolvency, or an application made for the appointment of a receiver, in the event of a default in the payment of its premiums, taxes or installments of rent, in the event that the lessee [fol. 27] should not within a reasonable time perform its obligations for the repair, restoration or replacement of the leased property, and further in the event of the destruction of a portion or all of the leased property, the revocation of its license, or that the leased property should be taken over by the state or federal government in the exercise of the power of eminent domain.

12. Defendants for answer to paragraph 11 of the petition, admit that the authorized capital stock of Radio Station WOW, Inc. is $2,000.00 par value, that it was authorized to commence business upon the payment of $1,000.00 in capital, that no other corporation or individual is liable for the payment of the rent, and deny each and every remaining allegation of fact in said paragraph 11 contained.

13. In answer to paragraph 12 of the petition, defendants further allege that each and all of the allegations therein and of the several subdivisions thereof, are wholly immaterial and subject to such objections:

(a) As to subdivision (a) thereof, defendants admit that John B. Dawson is the son-in-law of the defendant Bradshaw, that he is a lawyer residing in and having his office in New York City, that he has previously been associated in handling some legal matters for the companies engaged in the sale of bonds issued by Consumers Public Power District, and deny each and every remaining allegation of fact therein contained.

(b) As to subdivision (b) thereof, defendants admit the allegations therein, except that the defendant Gillin is a protege and close associate of the defendant Bradshaw, which is denied.

[fol. 28] (c) As to subdivision (c) therein, defendants admit that Guy C. Myers is the vice-president, a director, and the second largest stockholder of the defendant Radio Station WOW, Inc., that he has an office in New York City, that he has previously been engaged in promoting the sale of power facilities to Consumers Public Power District, and for want of information deny each and every remaining allegation of fact contained therein.

(d) As to subdivision (d) thereof, defendants admit that Francis P. Matthews is a director and stockholder of defendant Radio Station WOW, Inc., that he resides in Omaha, and for many years has been engaged in the practice of law, and for want of information deny each and every remaining allegation therein contained.

(e) As to subdivision (e) thereof, defendants admit that M. M. Meyers is the secretary, a director and stockholder of the defendant Radio Station WOW, Inc., that he resides in Omaha where he is engaged in the business of buying and selling bonds, and for want of information, deny each and every remaining allegation of fact therein contained.

(f) As to subdivision (f) thereof, defendants admit that Harvey E. Milliken is the treasurer, a director and stockholder of defendant Radio Station WOW, Inc., that he resides in Omaha, is engaged in the printing business, that the Printing Company with which he is associated has previously done printing for the Society, that he is a friend of the defendant Bradshaw, and for want of information, deny each and every remaining allegation of fact therein contained.

(g) As to the unnumbered paragraph following subdivision (f), defendants admit that the sale of power facilities to Consumers Public Power District does not affect the [fol. 29] membership of the Society and as to each and all of the remaining allegations of fact contained in paragraph 12 and the several subdivisions thereof, defendants deny each and every allegation of fact therein contained not heretofore expressly admitted to be true.

14. As to paragraph 13 of the petition, defendants admit that the officers of the Society did not, prior to the execution of said lease, advise the membership of the Society as a whole that it contemplated said specific lease and deny each and every remaining allegations of fact therein contained. In this behalf, defendants allege that the general negotiations for the sale or lease, or lease and sale of said radio station previously had, and the negotiations with the defendant Radio Station WOW, Inc., the authorization and execution of the lease, and the delivery of the possession of the property thereunder to the lessee, were all done in accordance with the usual and customary practice and in accordance with the powers conferred and the duties imposed upon the officers and directors of the Society and in accordance with the statutes of the State of Nebraska, the articles of incorporation and the constitution and by-laws of the Society, the action of the Sovereign Camp, the action of the board of directors, the proper authorization to the officers, in compliance with the laws of the United States with reference to the establishment and operation of the Federal Communications Commission, in conformity with the rules and regulations thereof, and directly responsive to the orders thereof, entered on December 15, 1942, and January 13, 1943, and all in good faith, and further specifically deny that there was any concealment thereof from the members of the Society, and further specifically deny that said lease of said radio station and of said space in the home office building of the Society was for an inadequate consid- [fol. 30] eration, but on the contrary allege that said transactions were for the best interests of the Society and its members, including the plaintiff herein.

15. As to paragraph 14 of the petition, defendants deny each and every allegation of fact therein contained.

16. As to paragraph 15 of the petition, defendants admit that plaintiff has made no demand upon the defendant

officers and board of directors and upon the Sover-n Camp of the Society, which was last in session in July 1941, and will next regularly be in session probably in the summer of 1945, and deny each and every remaining allegation of fact therein contained.

17. As to paragraph 16 of the petition, defendants deny each and every allegation of fact therein contained.

18. Defendants further allege that the Federal Communications Commission by virtue of the laws of the United States of America and its rules and regulations made pursuant thereto, has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer of said license to the defendant Radio Station WOW, Inc. and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found.

Wherefore, defendants pray that plaintiff's action be dismissed and that these defendants recover their costs herein.

[fol. 31] Rainey T. Wells, Brown, Crossman, West, Barton & Fitch, by Raymond M. Crossman, Counsel for the separate defendants, Woodmen of the World Life Insurance Society, Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston.

Duly sworn to by Farrar Newberry. Jurat omitted in printing.

[fol. 32] EXHIBIT #1 TO ANSWER

LEASE

Know All Men By These Presents that the Woodmen of the World Life Insurance Society, a corporation domiciled in Omaha, Nebraska, party of the first part, does hereby lease and let to Radio Station WOW, Inc., a corporation organized and existing under the laws of the State of Nebraska, having its principal office at 1708 Farnam Street,

Insurance Building, Omaha, Nebraska, party of the second part, all of the property now in use by Radio Station WOW for broadcasting, and all rights thereto (excepting certain rental space in the Insurance Building, Omaha, Nebraska, described in a separate lease entered into between the parties hereto simultaneously herewith), for the period of fifteen (15) years, for the consideration, terms and conditions as herein set forth, to wit:

1. Party of the first part does, by these presents, lease and let to the party of the second part, all and singular, the fifteen and ninety-three (15.93) hundredths acres of real estate owned by the party of the first part in Section 31, Township 16, Range 13, East, in Douglas County, Nebraska, and all of the buildings, radio towers, electric plant, equipment and radio transmission facilities erected thereon, and all machinery, instruments, contrivances, apparatus, equipment devices, tools and materials, consisting in part of transmitter and receiving equipment, control panels, transcribing equipment, microphones, grand pianos, electric organ, celesta, sound equipment, transmission, Transcription equipment, electric fixtures, music library, motors, engines, loud speakers, radio receiving sets, cameras, mobile [fol. 33] units and transmitter thereon, two supply units; portable transcribing equipment and all desks, tables, chairs, stands, filing cabinets and the household and personal property in the transmitter building, a more detailed description of which has been set forth in an inventory initialed by the parties hereto simultaneously with the execution and delivery of this lease, said inventory being incorporated herein and made a part hereof with the same force and effect as if herein set forth in full.

The rental agreed to be paid during the term of this lease is the sum of Eighty-one Hundred Sixty-six Dollars ($8,166.00) per month, for the first three-year period of the term of this lease, and the further sum of Fifty-six Hundred and Eighty Dollars ($5,680.00) per month during the last (12) years of the term of this lease. Said payments are to be made by the party of the second part on the first day of each month during the continuance of the term of this lease.

In consideration of the foregoing, the party of the first part hereby transfers with said lease all of its contracts with the National Broadcasting Company, and other firms,

partnerships and corporations, which it now holds with reference to broadcasting commercial or other programs and does also convey the net accounts due and payable for said commercial broadcasts, which accounts have accrued as of the effective date of this contract, in the amount of Twenty-Five Thousand Dollars ($25,000.00), and all good will.

2. This lease is to become effective and the term thereof shall commence as and when the Federal Communications Commission grants to the party of the second part a license to operate said radio station.

[fol. 34] 3. As a further consideration for the said lease, the party of the second part agrees to maintain said Radio Station WOW, and all of the property herein leased and let, in a first class condition, and in addition thereto to purchase and install at its own expense all necessary new equipment required to enable it to conform to the rules of the United States Government as they now exist, or may hereafter be required, and to supply and maintain said station with all the necessary improved machinery and devices for the carrying on of the radio business as it now exists, or it may hereafter be improved.

4. The party of the second part further agrees to pay to the proper authority all necessary city, county and state and federal taxes which may be levied and imposed during the term of this lease upon all the property herein leased and upon all the income received by the party of the second part therefrom by virtue of its operation of said station.

5. Said party of the second part agrees to maintain in force and effect during the term of this lease and at its expense insurance on the property covered by this lease, such insurance to be in the same amounts and of the same type as now carried by the party of the first part, the same being more particularly set forth on a separate schedule initialed by the parties hereto simultaneously herewith. The parties hereto agree that insurance moneys received shall be used to repair, restore or replace all such damaged or destroyed property, and such repaired, restored and replaced property shall be included in this lease as if originally described herein and shall not become the property of the party of the second part. The party of the first part and the party of the second part shall be named as the

[fol. 35] assured in said insurance policies as their respective interests may appear.

6. At the end of the fifteen (15) year lease period, the party of the second part agrees that it will deliver possession of, and surrender to the party of the first part or assigns all and singular, the land, buildings and equipment thereon and the personal property as herein described as being conveyed and replaced as such as may be hereafter purchased and used in the carrying on of the broadcasting business, the same to be surrendered in good order and condition, except for reasonable wear and tear and damage by fire or other unavoidable casualty. The party of the second part further agrees that it will assign and deliver to the party of the first part all contracts for the broadcasting of commercial programs by said radio station.

7. It is further agreed that the pending suit of the Woodmen of the World against the American Society of Composers, Authors and Publishers is not included in this lease, nor in any transfer of any portion thereof hereby made to the party of the second part.

8. If at any time the party of the second part, for any reason, fails to pay the monthly payments herein required, the party of the second part, or their assignees, hereby agree that in the event that all overdue monthly rental payments are not paid within thirty (30) days after the receipt of written notice from the party of the first part, they will thereupon transfer and deliver all the property covered by this lease to the party of the first part, and also turn over all books, accounts and contracts affecting the broadcasting business which it has accumulated or made and authorize the party of the first part to make collection of any moneys due, and apply the same to the payment of any moneys due the party of the first part under this lease.

[fol. 36] 9. It is further agreed that the party of the second part will grant, pay, or agree to pay no excessive salaries, or expense accounts, and no agreement shall be made which will in any manner reduce the income of said leased property to an amount where the monthly rental thereof cannot be paid, and that no salary shall be paid to any officer or employee in excess of Two Hundred and Fifty Dollars ($250.00) per month at any time during a

default of any monthly payment on the lease, and no traveling expense shall be incurred in excess of One Hundred ($100.00) per month in the period or default of the payment of the amount monthly required to be paid by the lease.

If the party of the second part shall accumulate funds in excess of the amounts required to pay the expense of the operation of the plant, and the lease rent required herein, it may anticipate future lease payments by paying the same upon the basis of a four per cent (4%) interest discount per annum for the time for which said payments have been anticipated.

10. It is agreed that the party of the second part will keep a true record of all of its contracts, receipts and disbursements and that all money collected shall be deposited in a bank agreed upon by the parties hereto and that all bills shall be paid by check, except such small items as may be paid from a petty cash account.

11. The party of the first part shall have the right to examine the books and accounts of the party of the second part each month, or at such periods as it may deem advisable.

12. The parties hereto agree that:

(a) In the event that there shall be filed by or against the party of the second part a petition in bankruptcy or insolvency or for the appointment of a receiver of all or a portion of the property of the party [fol. 37] of the second part and the party of the second part shall fail to procure the discharge thereof within ninety (90) days after the receipt of written demand from the part of the first part; or

(b) In the event that the party of the second part shall default in the payment of any insurance premiums, taxes, or installments of rent payable under the terms of this lease, and should fail to cure such default within ninety (90) days after the receipt of written notice from the party of the first part; or

(c) In the event that the party of the second part should fail within a reasonable time to perform its obligations above set forth for the repair, restoration or replacement of the leased property, and in the event

that the party of the second part should fail to cure such default within ninety (90) days after the receipt of written notice from the party of the first part (or if the same is of such nature that it cannot be cured within ninety (90) days, then it shall be deemed a sufficient compliance by the party of the second part if it shall commence to cure said default promptly on receipt of such written notice and shall proceed diligently therewith;)

then and in any of such events, the party of the first part shall have the right to give to the party of the second part ten (10) days notice in writing, stating that the term of this lease shall expire upon the expiration of said ten (10) day period because of the failure of the party of the second part to remedy such default, and upon the expiration of said ten (10) day period, the term of this lease shall expire and come to an end unless prior to the expiration of such ten (10) days all defaults shall have been cured by the [fol. 38] party of the second part. The provisions of this paragraph shall not be deemed to deprive the party of the first part of other remedies which the law may allow in the event of default by the party of the second part hereunder.

13. In the event that a substantial portion of the property covered by this lease should be destroyed as the result of any casualty beyond the control of the party of the second part, the rental payments provided for hereunder shall cease during the period that such property is being replaced or restored with the proceeds of the insurance policies hereinabove referred to. In the event of a total destruction of the leased property as a result of some casualty beyond the control of the party of the second part, or in the event that the license for the operation of said radio station shall be revoked by the Federal Communication Commission for any reason other than a default by the party of the second part hereunder, then and in either of such events, the party of the second part shall have the option to terminate and cancel this lease, effective immediately on the giving of written notice to the party of the first part.

14. In the event that the authorities of either the State or Federal Government should by the exercise of powers of eminent domain take over the property and facilities of

Radio Station WOW covered by this lease, then the party of the second part shall have the right to elect at its option:

(a) To receive from such governmental authority the amount of lease payments made by it and to continue payment to the party of the first part of the monthly rental payments provided under this lease, the amount of any excess rental payment to be retained by the party of the second part; or

(b) To cancel and terminate this lease, effective immediately upon the giving of written notice to party of the first part, in which case the term of this lease shall immediately come to an end, and all further obligations of the party of the second part hereunder shall cease.

In Testimony Whereof, the parties of the first and second part have hereunto set their names, at Omaha, Nebraska, on this, the third day of October, 1942.

(Signed) Approved Oct. 6, 1942, Rainey T. Wells, Gen. Atty.

Woodmen of the World Life Insurance Society, by De E. Bradshaw, President.

Attest: Farrar Newberry, Secretary.

Radio Station WOW, Inc., by John J. Gillin, Jr., President.

Attest: M. M. Meyers, Secretary.

STATE OF NEBRASKA,
County of Douglas, ss:

Be It Remembered that on this day personally appeared before me, a Notary Public within and for the county and state aforesaid, duly commissioned and acting, the Woodmen of The World Life Insurance Society, by De E. Bradshaw, its President, and Farrar Newberry, its Secretary, and also Radio Station WOW, Inc., by John J. Gillin, Jr., its President and M. M. Meyers, its Secretary, and acknowledged that they had executed the above and foregoing instrument for, and on behalf of the respective signers thereof, in their official capacity, for the consideration and purposes above set forth.

In Witness Whereof, I have hereunto set my hand and [fol. 40] official seal this Third day of October, 1942.

Wm. P. Kelley, Notary Public.

[File endorsement omitted.]

IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

SEPARATE ANSWER OF DEFENDANTS, RADIO STATION WOW, INC., AND JOHN J. GILLIN, JR.—Filed January 30, 1943

Comes now the defendants, Radio Station WOW, Inc. and John J. Gillin, Jr., and for answer severally admit, deny and allege as follows:

I

Admit that Woodmen of the World Life Insurance Society, hereinafter referred to as the Society, is a corporation organized and existing under the laws of the State of Nebraska, that its principal place of business is in the City of Omaha and that it is a fraternal beneficial association, but for want of sufficient information, deny each and every other allegation set forth in Paragraph One (I) of the petition.

II

The defendants deny the allegations contained in Para- [fol. 41] graph Two (II) of the petition for want of sufficient information.

III

Admit the allegations contained in Paragraph Three (III) of the petition.

IV

Admit that the individual defendants other than defendant Gillin, were at the times involved in this suit, officers of the Society, that they constitute a part of the Board of Directors, and that the control and management of the Society's business is vested in the Board. Defendants deny that the individuals named in Paragraph Four (IV) of the petition dominate and control the management of the affairs of the Society.

V

Admit the allegations of Paragraph Five (V) of the petition except the allegation to the effect that the station has developed a reputation as a representative of the Society and has created good will for it, which are denied for want of sufficient information.

VI

Deny the allegations contained in Paragraph Six (VI) and allege that the figures set forth in said paragraph reflect a profitable operation for the reason that up to the time of transfer of the broadcasting license and facilities as hereinafter alleged, the Society has been exempt from the payment of Federal Income Taxes and other forms of Federal Taxes on the income derived from the operation of said Radio Station. These answering defendants further deny that the figures set forth in plaintiff's petition purporting to reflect the receipts and disbursements and net income for the years 1937 to 1942 inclusive are correct and allege the correct figures before the depreciation to be:

[fol. 42]

Year	Receipts	Disbursements	Net Income
1937	$409,511.94	$204,880.63	$204,631.31
1938	450,389.44	276,220.30	174,169.14
1939	493,130.66	322,477.09	170,653.57
1940	529,887.87	347,855.35	182,032.52
1941	581,297.02	368,489.64	212,807.38
1942	562,303.63	364,865.89	287,437.74

VII

Admit the allegations contained in Paragraph Seven (VII) of the petition.

VIII

Defendants allege that defendant Gillin's salary for the year 1942 was $16,000.00, and that the same salaries as set forth in Paragraph Seven (VII) of the petition applicable to the year 1941 were paid to the officers therein named for the year 1942. Defendants admit that for the years 1937 to 1942 both inclusive, receipts and disbursements have increased and allege that they are informed that the total salaries to the Officers of the Society are as alleged in said Paragraph Eight (VIII).

Further answering said Paragraph Eight (VIII) these defendants deny each and every other allegation in said paragraph contained.

IX

Answering Paragraph Nine (IX) of the petition, defendants allege that the defendant Gillin is not an officer of the Society and specifically deny that the officers of said Society devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of Radio Station WOW and in this connection allege that Radio Station WOW is under the sole, complete and exclusive administration, management and operation of defendant Radio Station WOW, Inc. under rules, regulations and orders promulgated by the Federal Communications Commission, and in accordance with the lease herein- [fol. 43] after referred to, and deny that these answering defendants or any of the stockholders or Directors of defendant Radio Station WOW, Inc. are associates of any of the Officers or Directors of the Society. These defendants further allege that no person, firm or corporation other than the stockholders of Radio Station WOW, Inc. have any financial interest whatsoever in Radio Station WOW, Inc., and that no understanding or agreement, written, oral or implied, directly or indirectly, presently or under any condition, circumstance or contingency to be acquired, exists whereby any person, form or corporation other than defendant, Radio Station WOW, Inc. and its stockholders shall in any way participate either now or in the future in any profit or benefits which may arise out of the operation of Radio Station WOW by defendant Radio Station WOW, Inc.

Defendants further deny that the consideration to be paid by defendant Radio Station WOW, Inc. to the defendant Society under the lease hereinafter referred to is inadequate and allege that the consideration stipulated in said lease is fair, equitable and adequate.

(a) Admit the allegations in sub-paragraphs (a), (b) and (c) of Paragraph Nine (IX) of the petition.

(b) Admit the allegations contained in sub-paragraph (d) of said Paragraph Nine (IX) except that said lease was a purported lease which is denied and in this connection defendants allege that said lease is in writing, a true

copy thereof being attached to the Answer of the Society filed herein and hereby adopted, has been approved by the Federal Communications Commission, is in full force and effect and was entered into in good faith by the parties thereto.

(c) Admit the material allegations contained in subparagraph (e) of Paragraph Nine (IX) of the petition except "that said application is now pending before the [fol. 44] Federal Communications Commission." As to this defendants allege that pursuant to orders issued by the Federal Communications Commission on December 15, 1942, and January 12, 1943, said application was in all respects approved and the defendant Society and defendant Radio Station WOW, Inc. authorized and directed to effectuate said assignment; that pursuant to said authorization and direction and in accordance therewith and with the terms of the lease hereinafter referred to, possession of the leased premises was delivered by the defendant Society to defendant Radio Station WOW, Inc. at 11:00 o'clock P. M. Eastern War Time January 14, 1943, and since said time defendant Radio Station WOW, Inc. has had the exclusive right to the use of the call letters "WOW" and broadcasting frequency of 590 Kilocycles, and said defendant is now and since said date has been in possession of and operating the broadcasting station under and by virtue of the lease hereinbefore referred to and orders of the Federal Communications Commission.

X

Deny the allegations contained in Paragraph Ten (X) of the petition, except that said broadcasting station is being leased for approximately $97,000.00 per year for three (3) years, and approximately $67,000.00 per year for a twelve (12) year period thereafter, and that by the terms of the lease, accrued accounts in the amount of $25,000.00 were conveyed to defendant Radio Station WOW, Inc. and in this connection these answering defendants allege that said accrued accounts constitute and are a part of the property and assets contemplated to be transferred by the lease and were taken into account in determining the lease rate consideration to be paid by defendant Radio Station WOW, Inc. over the period of the lease and are

reflected in the amount of monthly lease payments stipulated therein.

[fol. 45] XI

For answer to Paragraph Eleven (XI) of the petition, defendants admit that no other corporation or individual is liable for the payment of the rentals stipulated in the lease; that the authorized capital of the defendant Radio Station WOW, Inc. is $2,000.00, and that it is authorized to commence business with $1,000.00 capital, defendants, however, allege that although the par value and authorized paid up capital stock of defendant Radio Station WOW, Inc. is $2,000.00 the incorporators, in addition to paying the sum of $2,000.00 which is the par value of the capital stock issued and outstanding, have paid into surplus the sum of $73,500.00 which is reflected in the surplus account on the books of said corporation.

Further answering said Paragraph Eleven (XI) these defendants deny each and every other allegation in said paragraph contained.

XII

In answer to Paragraph Twelve (XII) of the petition, defendants allege that each and every allegation contained in said paragraph and in its several sub-paragraphs are wholly incompetent immaterial and irrelevant and subject to such objection.

As to sub-paragraph (a) of Paragraph Twelve (XII) defendants admit that John B. Dawson is a son-in-law of defendant Bradshaw, a lawyer by profession having an office in the City of New York, and defendants allege that he is specialized as a Bond Attorney, and as such and for and on behalf of certain Eastern Banking Interests has passed on the legality of certain bonds issued by Nebraska political sub-divisions.

As to sub-paragraph (b) of Paragraph Twelve (XII) defendants admit the allegations therein set forth except that defendant Gillin is a "protege" and close associate of defendant Bradshaw, which is denied.

[fol. 46] As to sub-paragraph (c) of Paragraph Twelve (XII) of the petition, defendants admit that Guy C. Myers is the Vice-President of defendant Radio Station WOW, Inc. as well as a director and the second largest stock-

holder; that he has an office in the City of New York, and has been interested in the transfer of certain power facilities in this State, but deny any knowledge of the manner in which he is compensated for services rendered in connection with such acquisition and for want of such information deny each and every other allegation in said sub-paragraph contained.

In connection with sub-paragraph (d) of Paragraph Twelve (XII) admit that Francis P. Matthews is a stockholder and director of defendant Radio Station WOW, Inc., resides in the City of Omaha, and has practiced Law in said City for many years, but deny any knowledge other than that received by hearsay, of the relationship of attorney and client that is alleged to exist between him and Guy C. Myers.

As to sub-paragraph (e) of Paragraph Twelve (XII) admit that M. M. Meyers is Secretary of defendant Radio Station WOW, Inc., and is also a stockholder and director. Admit further that he resides in Omaha and conducts among other businesses the buying and selling — bonds, but for want of information deny all other allegations in said sub-paragraph contained.

As to sub-paragraph (f) admit that Harvey E. Milliken is Treasurer, a Director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha, is engaged in the printing business, is a friend of defendant Bradshaw and that the Company with which Harvey E. Milliken is associated has, in the past, done printing for the defendant Society. Deny the other allegations in said sub-paragraph contained.

In connection with the paragraph following sub-paragraph (f) of Paragraph Twelve (XII) of the petition, [fol. 47] defendants allege that the only persons interested in the operation of Radio Station WOW, Inc., and in benefits or profits that might accrue therefrom in addition to John J. Gillin, Jr., Francis P. Matthews, Guy C. Myers, Harvey E. Milliken and M. M. Meyers, are Thomas J. Wallace of Chicago, Illinois, and J. J. Isaccson and Robert Samardick of Omaha, Nebraska. Further answering said paragraph, defendants deny each and every other allegation therein.

XIII

With reference to Paragraph Thirteen (XIII) of the petition, these answering defendants allege that they are informed and believe that the membership as a whole of the Society was not advised prior to the execution of the lease of the fact that such execution was contemplated. Further answering, these defendants deny each and every other material allegation in said paragraph contained.

XIV

As to Paragraph Fourteen (XIV) of the petition, these answering defendants deny each and every material allegation therein contained.

XV

In connection with Paragraph Fifteen (XV) of the petition, these answering defendants allege that they are informed and believe that plaintiff made no demand as alleged therein and that the Soveriegn Camp of the Society will next regularly be in session probably in the summer of 1945, and deny each and every other allegation of material fact therein contained.

XVI

Deny the allegations contained in Paragraph Sixteen (XVI) of the petition.

[fol. 48]

XVII

Defendants allege that the plaintiff has not legal capacity to sue and maintain this action, for the reasons that the transaction and subject of the action is one exclusively within the original jurisdiction of the Insurance Commissioner of the State of Nebraska and the Attorney General of the State of Nebraska. In this behalf defendants allege that the Insurance Commissioner has not presented the facts relating thereto to the Attorney General, the Attorney General has not given notice to the chief executive officers of the Woodmen of the World Life Insurance Society with reference thereto, and of his intention to institute proceedings by reason thereof, unless for good cause it be shown that said proceedings should not be commenced, and the Attorney General of the State of

Nebraska is the sole proper party plaintiff to institute and maintain said action, all as provided by Sections 44-1255, 1256 Neb. 1941 Sup.

XVIII

Deny each and every other allegation in said petition contained not hereinbefore specifically admitted to be true.

Wherefore, having fully answered, these defendants pray that plaintiff's cause be dismissed; that they go hence without day and recover costs herein expended.

Radio Station WOW, Inc., and John J. Gillin, Jr.,
by Paul P. Massey, their Attorney.

Duly sworn to by John J. Gillin, Jr. Jurat omitted in printing.

[fol. 49] [File endorsement omitted]

* * * * * * *

IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

REPLY—Filed February 27, 1943

Comes now the plaintiff on behalf of himself and all others members of Woodmen of The World Life Insurance Society, and for reply to the answers of the defendants:

(1) Denies each and every allegation contained in said answers except such as admit allegations of the plaintiff's petition, except such as hereinafter is specifically admitted.

(2) Admits the allegations of Paragraphs 2, 3, 7 and 11 (c) of the answers of the Woodmen of The World Life Insurance Society, Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston, and that a copy of the lease [fol. 50] referred to in plaintiff's petition is attached to said answer as Exhibit 1.

(3) Admits that the possession of the property described in Exhibit 1 was delivered by the Society to Radio Station WOW, Inc. on January 14, 1943 and that the latter is now

in possession of and operating said property, but plaintiff denies that such transfer of possession was directed by any order of the Federal Communications Commission.

(4) Admits that the Federal Communications Commission has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license to operate said radio station.

(5) For further reply to said answers plaintiff denies that Sections 44-1255 and 1256 of the Compiled Statutes of Nebraska, 1941, Sup., provide that the Attorney General of the State of Nebraska is the sole proper party to institute and maintain this action and if said sections did so provide, which plaintiff expressly denies, said sections would be in violation of the Constitution of the State of Nebraska, and therefore, void and unenforceable.

Wherefore plaintiff for himself and all other members of the Society prays judgment as in his petition.

Homer H. Johnson, Plaintiff, by Stewart, Stewart & Whitworth and Ralph Slocum, His Attorneys.

Duly sworn to by Homer H. Johnson. Jurat omitted in printing.

[fols. 51-53] [File endorsement omitted]

[fols. 54-58] IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

Bill of Exceptions—Filed July 29, 1943

Trial had at the Regular February A. D. 1943 Term of said court, before Honorable John A. Rine, Judge, at Omaha, Nebraska, March 1 to 9, 1943.

APPEARANCES:

For Plaintiff, Mr. Don W. Stewart of Messrs. Stewart, Stewart and Whitworth, and Mr. Ralph Slocum.

For Defendants Woodman of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar New-

berry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston, Mr. Rainey T. Wells, Mr. Raymond M. Crossman of Brown, Crossman, West, Barton and Fitch.

For Defendants Radio Station WOW Inc., and John J. Gillin, Jr., Mr. Paul P. Massey.

[File endorsement omitted.]

[fol. 59] Received of Attorneys for Plaintiff, for examination and amendment, a draft of a Bill of Exceptions consisting of two volumes, this being Volume 1, in the case of Homer H. Johnson, Plaintiff, versus Radio Station WOW, Inc., Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., Docket 370, Number 111, tried in the District Court of the Fourth Judicial District of Nebraska, at Omaha, Douglas County, at the Regular February A. D. 1943 Term of said Court.

Dated July 19, 1943.

Rainey T. Wells, Brown, Crossman, West, Barton & Fitch, C, Attorneys for Defendants Woodmen of the World Life Insurance Society, a Corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Bradon, R. E. Miller and Sterling C. Holston. Paul P. Massey, Attorney for Defendant Radio Station WOW, Inc., and John J. Gillin, Jr.

We herewith return the draft of the Bill of Exceptions in the above entitled case, submitted to us on the date above written, and propose the following amendments:

None.

Dated July 28, 1943.

Rainey T. Wells, Brown, Crossman, West, Barton & Fitch, Attorneys for Defendants Woodmen of the World Life Insurance Society, a Corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston. Paul P. Massey, Attorney for Defendants Radio Station WOW, Inc., and John J. Gillen, Jr.

[fol. 60] It Is Hereby Stipulated and Agreed by and between the parties hereto, plaintiff and defendants, that the within and following Volume 1 together with Volume 2 constitutes a true and complete transcript of all the evidence, oral and documentary, offered, received or rejected, upon the trial of this cause, together with all stipulations, offers, objections, motions and rulings of the court thereon, made at said trial.

Dated —— ——.

—— ——, Attorneys for Plaintiff; —— ——, Attorneys for Defendants Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston; —— ——, Attorney for Defendants Radio Station WOW Inc., and John J. Gillen, Jr.

Filed in District Court, Douglas County, Nebraska, Jul. 29, 1943. Robert Smith, Clerk.

[fol. 61] Reporter's Certificate to following Bill of Exceptions omitted in printing.

[fols. 62-63] Judge's Certificate to Bill of Exceptions

I certify that the within and following Volume 1 together with Volume 2, pp. 1 to 998 inclusive, constitutes a true and complete transcript of all the evidence, both oral and documentary, offered upon the trial of this cause, together with all oral stipulations, offers, objections, motions and rulings of the court thereon, made at said trial; that the said trial was had at the time and place stated herein; and, upon application of the Plaintiff herein, this Bill of Exceptions is allowed by me, and ordered to be made a part of the record in this case.

Dated July 29, 1943.

John A. Rine, Judge.

Clerk's Certificate to following Bill of Exceptions omitted in printing.

[fol. 64] Colloquy Re Amendment of Pleadings

Mr. Crossman: In paragraph 9 of the plaintiff's petition, at page 4 of the petition, is the charge that the individual defendants for personal profit, etc.—Now, I want to as-

sume the full responsibility for this because I had some responsibilities about this answer, and in paragraph 10 of the answer where we answered paragraph 9 of the petition, we made some admissions, and then I just simply neglected to deny the other allegations of that paragraph. It raises no new issue but simply joins the issue where possibly the issue had not been joined fully. I would like leave to insert in paragraph 10 a subdivision (c) and amend instanter as follows:

"(c) These defendants deny each and every remaining allegation of paragraph 9 of the petition."

Mr. Stewart. There is no objection. And before we go further, the plaintiff asks leave to amend paragraph 9, subparagraph (d) by adding thereto at the bottom of page 5, these words:

"The provisions of said lease do not adequately protect the Society and are extremely favorable to defendant Radio Station WOW, Inc."

Mr. Wells: We have no objection to the amendment: the only thing is the denial of it.

Mr. Crossman: Well, we have a denial and my denial may stand.

[fol. 65] Mr. Stewart: Before we proceed with the introduction of evidence, Mr. Massey raised a question about the meaning of the word "associates" in the plaintiff's petition, and to eliminate any uncertainty I would like leave to amend Paragraph 9 of the petition, the third line from the bottom of Page 4, which states that "the defendants devised a plan to unlawfully procure for the benefit and profit to themselves and associates", I would like leave to insert the words "their friends" after the word "themselves". It is Paragraph 9 at the bottom of Page 4 of the petition, third from the last line.

Mr. Crossman: How would it read then?

Mr. Stewart: "Themselves, their friends and associates".

Mr. Crossman: Would you tell us who the associates are?

Mr. Stewart: I will make that clear to you.

The Court: Leave granted.

Mr. Stewart: The plaintiff offers in evidence Exhibit 1, being a certified copy of the articles of incorporation of

the Woodmen of the World Life Insurance Society, as filed on August 18, 1937 in the office of the Secretary of State of Nebraska.

There have not been any subsequent amendments, have there, Mr. Wells?

Mr. Wells: Let me see them. I will look it up.

Mr. Stewart: All right. What do you find? Is that the [fol. 66] last?

Mr. Wells: Yes, sir.

Mr. Stewart: That is what I thought it was.

Mr. Wells: No objection.

The Court: Received.

(Exhibit 1 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

(Here follows 1 photolithograph, side folio 67)

Exhibit No. 1

STATE OF NEBRASKA

Department of State

I, Frank Marsh, Secretary of State for the State of Nebraska, do hereby certify that the attached is a true and correct photostatic copy of the Amended and Substituted Articles of Incorporation of the Sovereign Camp of The Woodmen of The World or/and The Pacific Woodmen Life Association, changing the name of WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND/OR OMAHA WOODMEN LIFE INSURANCE SOCIETY; as filed in this office on August 18th, 1937, and recorded in book 92, page 413, Miscellaneous Incorporations.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska.

Done at Lincoln this 19th day of February in the year of our Lord, one thousand nine hundred and forty-three

Frank Marsh
SECRETARY OF STATE

DEPUTY

[fol. 67a] Amended and Substituted Articles of Incorporation of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association the name of said corporation hereafter to be Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society.

Article I

The name of this corporation is the "Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society," to be known as the Society, and it may do business under either or both names; but it shall do business only under the name of "Omaha Woodmen Life Insurance Society" in the states of California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming. Its principal place of business shall be in the City of Omaha, Douglas County, State of Nebraska, or at any other place which may be selected by the Board of Directors.

Article II

This corporation is a Fraternal Benefit Society, organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. It has and shall continue to have a lodge system with ritualistic form of work and representative form of government. It shall have perpetual succession unless these Articles of Incorporation are surrendered, or the Society consolidated, merged or dissolved under such plan and in such manner as authorized by the Sovereign Camp. It has and shall continue to have authority to provide for a supreme representative governing body to be known as the "Sovereign Camp" which shall have all authority to provide for the organization of local camps and head camps and prescribe the laws, rules and regulations for their government.

Article III

This corporation shall continue, as heretofore, to have authority to combine white persons, not over sixty years of age, of sound bodily health, exemplary habits and good moral character, into a Fraternal Benefit Society; to issue benefit certificates of membership and juvenile and whole family protection certificates on such forms of certificates

as may be authorized by the Sovereign Camp. It shall have power to levy and require the payment of assessments, dues and contributions, by whatever name known, from all its members and certificate holders, to determine the amount thereof, and the time and manner of collecting the same, in order to provide funds for the payment of the expenses of conducting the business of the Society, and to create funds from which payments may be made to its members, or certificate holders, and to beneficiaries on the death of the beneficiary members, or certificate holders, and to erect a monument at the grave of each deceased member entitled to same, and to maintain the reserves required by the different forms of certificates issued and outstanding; to enter into contracts of insurance, reinsurance, coinsurance or merger as to and with individuals, groups and corporations; and to do and perform such other acts as may be necessary to carry out the plans and purposes of the corporation as may from time to time be authorized and provided by its Constitution, Laws and By-Laws.

Article IV

This corporation shall have power, through its Sovereign Camp or Board of Directors, to provide a Constitution, Laws and By-Laws, rules and regulations for its own government and that of its camps and members and certificate holders; and to alter and amend the same at any session [fol. 67b] of the Sovereign Camp or meeting of its Board of Directors. The Constitution, Laws and By-Laws, rules and regulations now in force shall continue in force and effect until altered, amended or repealed. It shall have power to purchase and hold such real and personal property, as may be authorized, for its convenience and use, and may sell, transfer and dispose of the same as it may deem expedient. It may invest its funds in such securities, including the capital stock of corporations as may be authorized, in accordance with its Constitution, Laws and By-Laws. It may also purchase, erect, equip, furnish, maintain and operate radio stations; homes, hospitals and sanatoria for the use and benefit of its aged, infirm and diseased members, and orphans of members, and recreational centers for its members and their families; and administer the same under such rules and regulations as may be prescribed by the Sovereign Camp or the Board of Directors. It

may contract for the purchase and sale of supplies, paraphernalia, badges and other appliances used in the administration and business of the Society, and may do all other acts and things necessary to carry out the objects and purposes for which it is organized.

Article V

(1) The Sovereign Camp shall be the supreme representative governing body and shall be composed of its elective officers, members of elective committees, who are ex officio delegates thereto, and such other delegates as are now elected or as shall hereafter be provided for and elected pursuant to the provisions of its Constitution, Laws and By-Laws. It shall be the sole judge of the qualifications of its own members.

(2) Regular meetings of the Sovereign Camp shall be held as often as once in each four calendar years at such times and places as may be determined under the provisions of its Constitution, Laws and By-Laws, and special meetings thereof may be convened as provided by the laws of the Society. The next regular meeting of the Sovereign Camp shall be held as provided by its laws.

(3) The officers of the Sovereign Camp and of the Society shall be the same persons and shall be known as: President, Vice President, Secretary, Treasurer, Escort, Watchman, Sentry and seven Auditors, and such other officers as may be authorized by the Sovereign Camp, who shall be elected by the Sovereign Camp.

(4) The terms of office of all officers of the Sovereign Camp and of the Society shall be four years and until their successors are elected and qualified. The Sovereign Camp shall have and exercise full legislative power in all matters affecting the business and management of the Society. It may provide for the expulsion or suspension of Camps or members or certificate holders for failure to pay assessments, dues or other demands made by or under authority of the Sovereign Camp or its officers acting under the provisions of the Constitution, Laws and By-Laws of the Society, or for the violation of the provisions of the Constitution, Laws and By-Laws of the Society as they now exist or as may hereafter be adopted.

Article VI

The officers of the Sovereign Camp specifically named in Article V, paragraph 3, and such other officers as may be authorized by the Sovereign Camp, shall constitute the Board of Directors of the Society, a majority of whom shall constitute a quorum for the transaction of business. The President and Secretary shall also be President and Secretary, respectively, of the Board of Directors. The Board of Directors shall have the general control and management of the business affairs of this corporation and all matters, except during the sessions of the Sovereign Camp.

The Board of Directors shall have such legislative power as it now has and which it may hereafter be invested by the Constitution, Laws and By-Laws adopted by the Sovereign Camp.

[fol. 67c] Regular meetings of the Board of Directors shall be held at such times and places as may be determined by the Board under the Constitution, Laws and By-Laws of the Society. Special meetings thereof may be convened as provided by the Constitution, Laws and By-Laws of the Society.

Article VII

The highest amount of indebtedness which this Corporation can create for general fund purposes and as a charge against its general expense fund shall at no time exceed the amount of $500,000.00.

Article VIII

The President shall, subject to any limitations in the Constitution, Laws and By-Laws, fill by appointment all vacancies occurring in the Board of Directors, and offices of the Sovereign Camp, to serve until the first meeting of the Sovereign Camp thereafter, at which meeting such vacancies shall be filled by election to serve for the unexpired term.

Article IX

These Articles of Incorporation may be altered or amended at any meeting of the Sovereign Camp by two-thirds vote of the members constituting the same, or at any meeting of the Board of Dire-tors by a two-thirds vote of the members thereof.

William Ruess, Chairman of Auditors.
Walter M. Crawford, Auditor-Director.
S. L. Caine, Auditor-Director.
Robt. G. Plunkett, Auditor-Director.
W. C. Braden, Auditor-Director.
William E. Mooney, Auditor-Director.
R. E. Miller, Auditor-Director.
De E. Bradshaw, President.
T. E. Patterson, Vice President.
Farrar Newberry, Secretary.
Morris Sheppard, Treasurer.
H. E. Klugh, Escort.
Chas. A. Hines, Watchman.
Sterling C. Holston, Sentry.

CERTIFICATE

Know All Men By These Presents:

That we, the undersigned, De E. Bradshaw, President and Farrar Newberry, Secretary of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association, do hereby certify that the above and foregoing Amended and Substituted Articles of Incorporation are the Amended and Substituted Articles of Incorporation of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association, the name of said corporation hereafter to be Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society adopted by the Board of Directors of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association at a meeting of the Board of Directors held in the City of Los Angeles in the State of California, by a unanimous affirmative vote of fourteen members of the said Board of Directors on the 19th day of June, 1937, and that said meeting of said Board of Directors at which the aforesaid Amended and Substituted Articles of Incorporation were adopted was called on due notice to all of its members as provided by the Constitution, Laws and By-Laws of the Sovereign Camp of the Woodmen of the World or/and the Pacific Woodmen Life Association. [fol. 67d] In Witness Whereof, we have hereunto set our hands and the official seal of the Sovereign Camp of the

Woodmen of the World or/and The Pacific Woodmen Life Association at Omaha, Nebraska, this 26th day of July, 1937.

De E. Bradshaw, President. Farrar Newberry, Secretary, Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association, Hereafter to be Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society. (Society Seal.)

STATE OF NEBRASKA,
County of Douglas, ss:

Before me, Katherine V. Peterson, a Notary Public within and for the County of Douglas and State of Nebraska, on this the 26th day of July, 1937, personally came the above named De E. Bradshaw, President, and Farrar Newberry, Secretary, known to be the identical persons who signed the above and foregoing certificate, and to me known to be the President and Secretary, respectively, of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association, the name of said corporation hereafter to be Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society, and each acknowledged that he signed the above certificate as his voluntary act and deed and as the voluntary act and deed of the Sovereign Camp of the Woodmen of the World or/and The Pacific Woodmen Life Association, the name of said corporation hereafter to be Woodmen of the World Life Insurance Society and/or Omalia Woodmen Life Insurance Society.

Katherine V. Peterson, Notary Public in and for Douglas County, Nebraska. (Notary Seal.) My Commission expires September 1, 1938.

"Department of Insurance, Lincoln, Nebraska, August 4, 1937, Received & Filed."

[fol. 68] 5 Mr. Stewart: The plaintiff offers in evidence Exhibit No. 2, being a copy of the constitution, laws and by-laws of the Woodmen of the World Life Insurance Society, as amended at its biennial session at New York, New York, June, 1939, in effect September 1, 1939.

Mr. Wells: No objection.

The Court: It will be received.

(Exhibit 2 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 69] EXHIBIT "2"

Constitution

Laws and By-Laws of the

Woodmen of the World Life Insurance Society

as Amended at its

Biennial Session at New York, New York, June, 1939

In Effect September 1, 1939

[fol. 69a] Objects and Beneficiaries

Sec. 3. The objects of this Society shall be to combine white persons of so nd bodily health, exemplary habits and good moral character, under the age of sixty years, into a secret, fraternal beneficiary and benevolent Society; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; create funds from which, on reasonable and satisfactory proof of death of a beneficiary member who has complied with all the requirements of this Society, there shall be paid the sum named in the certificate, less any sums due the Society, to the person or persons named in the certificate as beneficiary or beneficiaries, which beneficiary or beneficiaries shall be such as are not prohibited by the laws of the state in which the original certificate is delivered to the applicant. Provided, that on the request of the applicant or of any member at any time, the beneficiary certificate may provide that if the beneficiary should predecease the member, then, and in that event, some other person specifically designated shall be named as the alternate beneficiary. The member may designate this Society as his beneficiary for the use and benefit of any home, hospital or sanatorium operated by the Society if he has no wife nor children, or if he is the occupant of any home, hospital or sanatorium operated by this Society. Also from said funds there shall be erected at the grave of every beneficiary member who dies while in good standing in this Society, if he has paid for the same as provided in these laws, a monument as provided in the bene-

ficiary certificate and in Section 84 of these laws, which monument shall be of such design as may be agreeable to or selected by the benefic-ary or beneficiaries of the deceased member and approved by the President; provided further, that in case no such monument be erected, contracted for or demanded by the beneficiary or beneficiaries within two years after the receipt of proofs of death of said member, then the amount of the cost of such monument shall revert to the beneficiary fund, and the Secretary of this Society shall enter upon his books the cancellation of the liability of such monument. Also, from said fund there may be paid benefits to the members of this Society on account of physical disability upon the member complying with the laws of the Society.

* * * * * * *

[fol. 70] Mr. Stewart: The plaintiff offers in evidence Exhibit No. 3, being the constitution, laws and by-laws of the Woodmen of the World Life Insurance Society as amended at its biennial session at San Francisco, California, June-July, 1941, in effect September 1, 1941.

Mr. Wells: No objection.

The Court: Received.

(Exhibit 3 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 71] EXHIBIT "3"

Constitution, Laws and By-Laws of the Woodmen of the World Life Insurance Society

As Amended at its Biennial Session at San Francisco, California, June-July, 1941

In Effect September 1, 1941

[fol. 71a] Constitution, Laws and By-Laws

Name

Section 1. This corporation shall be known as the "Woodmen of the World Life Insurance Society," hereinafter referred to as the Society; and its supreme legislative and governing body shall be known as the Sovereign Camp.

Powers

Sec. 2. The Sovereign Camp shall have original and appeliate jurisdiction in all matters pertaining to the general welfare of this Society.

. . . . . .

[fol. 71b] Objects and Beneficiaries

Sec. 3. The objects of this Society shall be to combine white persons of sound bodily health, exemplary habits and good moral character, under the age of sixty years, into a secret, fraternal beneficiary and benevolent Society; provide funds for their relief; comfort the sick and cheer the unfortunate by attentive ministrations in times of sorrow and distress; promote fraternal love and unity; own, maintain and operate radio broadcasting stations, homes, hospitals, sanatoriums, recreational, educational, health and community centers, and publish periodicals, and carry on other activities which may be for the benefit of its members, their beneficiaries and dependents; issue to its members benefit certificates providing for life insurance, including endowment insurance, annuity, retirement income disability, monument, accidental injury and death, sickness and hospitalization benefits, and may provide for cash surrender and loan values, extended and paid-up insurance, and other withdrawal equities and non-forfeiture options, and for such other purposes, in such amounts, on such forms, and plans and showing of eligibility, as may be authorized by the President, the Board of Directors, or the Sovereign Camp; provided, that such cash surrender and loan values, extended and paid-up insurance, and other withdrawal equities and non-forfeiture options shall in no case exceed in value the portion of the reserve to the credit of the certificate; provide funds for the maintenance of the reserves required under said benefit certificates, for the payment of the expenses of conducting the business of the Society, and, on reasonable and satisfactory proof required by the Society that the members or beneficiaries are entitled to receive said benefits or withdrawal equities, for the payment of said benefits or withdrawal equities to such members or to such designated beneficiaries as are not prohibited by the laws of the state in which the original certificate is delivered.

. . . . . .

[fol. 71c] Duties of Officers

Sec. 10. (a) The President shall preside at all meetings of the Sovereign Camp and the Board of Directors, and shall have a general supervision over the affairs of this Society; shall discipline and dispose of charges against Camps and Head Camps for violations of the laws of this Society, or appeals from decisions of same; shall construe the laws of this Society and be the executive officer thereof, and, if found correct, shall approve every claim and sign every warrant drawn on the Treasurer before same shall be paid; he shall determine the necessity for any additional payments and shall require the payment thereof by the members of the Society, and perform such other duties as shall be imposed on him by these laws, the Sovereign Camp or Board of Directors. He may grant written dispensations for any purpose except to admit a person to membership not physically qualified under these laws; provided, that he shall not have the power to do anything that will impair the contract of a beneficiary member of this Society.

. . . . . .

[fol. 71d] Board of Directors

Sec. 26. (a) All power and authority of the Sovereign Camp, when not in session, shall be vested in the Board of Directors, except as herein provided.

(b) It shall hold semi-annual meetings on such dates as may be determined by it. It shall also fix the dates for the meetings of the Auditors.

(c) It shall examine the transactions and reports of its officers and transact any business that cannot be delayed until a meeting of the Sovereign Camp.

[fol. 71e] (d) Special meetings of the Board of Directors may be called by the President whenever he may deem it necessary for the good of the Society, and shall be called by him whenever three members of the Board of Directors, in writing, request the same.

(e) The Board of Directors shall have legislative power at regular or special meetings over all matters presented to it for action; provided, that no proposed legislation shall be enacted by the Board of Directors unless the same

shall receive the affirmative vote of at least two-thirds of the members thereof; and, provided further, that no legislation enacted by the Board of Directors shall be in force until approved by two-thirds of the members of the Sovereign Camp, other than the members of the Board of Directors.

. . . . . .

[fol. 71f] (b) The Board of Directors shall have general supervision and control of all buildings and real estate of the Society.

. . . . . .

Sovereign Camp Meeting

Sec. 28. (a) Regular meetings of the Sovereign Camp shall be held biennially in the odd numbered years at such time and place as may be selected by the Board of Directors.

(b) Special meetings of the Sovereign Camp may be called by the President at any time and place, when requested to do so by two-thirds of the Board of Directors. Special meetings shall have all the powers of a regular meeting, except as herein prohibited.

. . . . . .

[fol. 71g] Election, Term of Office and Installation

. . . . . .

Sec. 35. (a) The Sovereign Camp shall designate the compensation to be paid to the officers, members of the Board of Directors and standing committees of the Society, and shall pay such mileage and per diem to its members as it may determine at its sessions for attending the same.

(b) No salaried officer of the Society shall have the right to vote on the question of designating the compensation to be paid to any elected salaried officer.

. . . . . .

[fols. 72-77] Mr. Stewart: The plaintiff offers in evidence Exhibit No. 4, being a copy of the Woodmen of the

World magazine dated November, 1942, which is offered for the purpose of showing the character of the monthly magazine put out by the Woodmen of the World Life Insurance Society.

The Court: Received.

(Exhibit 4 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

* * * * * * *

[fol. 78] "FARRAR NEWBERRY of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination.

By Mr. Stewart:

13 Q. Mr. Newberry, will you state your name and business, please?

[fol. 79] A. My name is Farrar Newberry; my position is secretary of the Woodmen of the World Life Insurance Society.

14 Q. How long, approximately, have you held that position?

A. Since March 15, 1937, I believe. I was appointed at the resignation of Mr. John T. Yates, and at our convention meeting three or four months after that I was elected, and four years later I was re-elected: I believe that record is correct.

15 Q. Is this a correct statement of the Woodmen of the World Life Insurance Society, that it has been a corporation since approximately 1890, organized and existing under the laws of the State of Nebraska as a fraternal beneficial association with its principal office in Omaha, Douglas County, Nebraska, and organized and existing for the sole benefit of its members and their beneficiaries?

A. Yes, sir, I think so.

16 Q. Approximately what are the assets of the company?

A. The gross assets are about $134,000,000.00.

17 Q. Approximately how much insurance does it have in force?

A. About $370,000,000.00—that is not exact. You are asking approximately?

18 Q. Yes. And about how many members does it have?
A. About 325,000 to 330,000 members."

Mr. Stewart: The question near the bottom of the Page 106. (Reading):

19 "Q. Is this a correct statement of the officers of the Society: De E. Bradshaw, president; T. E. Patterson, vice-[fol. 80] president; Farrar Newberry, secretary; William Ruess, chairman of auditors; W. C. Braden, auditor; R. E. Miller, treasurer; and Sterling C. Holston, escort?
A. It is correct as far as you go. It is not complete.
20 Q. Are all of those individuals whose names I have just read members of the board of directors?
A. Yes.
21 Q. Are there any other members of the board of directors that reside in the State of Nebraska?
A. Yes."

Mr. Stewart: On Page 109. (Reading):

22 "Q. Then for the year 1942, what is the salary of Mr. Bradshaw as president, so far as radio is concerned?
A. I think it is the same as you have it there, $15,000.00.
23 Q. And in addition to that what other salary does Mr. Bradshaw receive from the Society?
A. He receives a total of $50,000.00. He receives $35,000.00 besides this $15,000.00.
24 Q. Making a total of $50,000.00?
A. That is right.
25 Q. Mr. Gillin's salary for 1942, you said, was $16,000.00?
A. Yes, $16,000.00.
26 Q. Mr. Ruess, chairman of auditors, his salary for 1942 is——
A. Is $15,000.00.
27 Q. $10,000.00 charged to the radio?
A. And $5,000.00 to the Society.
[fol. 81] 28 "Q. And $5,000.000 charged to the Society, for a total of $15,000.00?
A. Yes, sir.
29 Q. And your salary for 1942 charged to the radio station is $5,000.00?
A. That is right.
30 Q. And $15,000.00 charged to the Society, for a total of $20,000.00?

A. Yes.

31 Q. And Mr. Wells, as general counsel, in 1942 received $5,000.00 charged to the station, and $15,000.00 charged to the Society, for a total of $20,00.00?

A. That is right."

Mr. Stewart: Near the middle of that page. (Reading):

32 "Q. Do you have the records of the proceedings of the Sovereign Camp with you here in the court room?

A. No, sir.

33 Q. You have such records under your supervision?

A. Oh, yes.

34 Q. Is there a printed record made of the proceedings of each Sovereign Camp?

A. Yes, sir.

Mr. Steward: On Page 112, at the top. (Reading):

35 "Q. Do you attend all of the meetings of the board of directors of the Society, Mr. Newberry?

A. Yes.

[fol. 82] 36 "Q. When was mention made in any of those meetings of the possible leasing or sale or other disposition of the radio station?

A. I tried to answer that from memory. I said it was either in August, 1941, or February of this year. I told you the decision was made for President Bradshaw to go ahead and negotiate for disposition of the radio as late as February, 1942 meeting, but you asked me a while ago, I understood, when was the first time it was discussed.

37 Q. That is right. Was the matter referred to any committee, or was it left to Mr. Bradshaw?

A. It was discussed in the board, and my recollection is it was left to the president to make a suitable negotiation."

Mr. Stewart: Then turn to Page 118. (Reading):

38 "Q. How much of your time, approximately, do you devote to the radio station?

A. As I have told you, I have been in fi committee meetings and probably nearly all of the conferences we hold among our executive officers when I am in the city, and I would say it takes my time, the same as others, but I

would not claim the responsibility of it—that is largely on the president of the society, and he has borne the brunt of the thing. I do not claim credit for doing a lot for the radio, except I am the accounting officer, and, of course, keep the records in the departments."

Mr. Crossman: I would like to interrupt you at this time to say that Mr. Newberry is now in the court [fol. 83] room, when you come to a consideration of that question.

Mr. Stewart: All right. (Reading):

39 "Q. Well, Mr. Bradshaw testified, as I recall it, that the time he devoted to the station would not exceed 10% of his time.

A. Well, that may be so. I think it is a modest statement.

40 Q. What would you say as to your own time, have you devoted more or less than 10% of it?

A. Well, I could not say that I have devoted more than 10% of my time, but I have written some of the spots that come on during the day and have made some speeches for the National Fraternal Congress of America, and assisted in the program for the celebration of our Fiftieth Anniversary which originated in our station and was used in over one hundred stations throughout the United States, but I would not claim credit for the tremendous success of the operation of the radio because of the time I have given to it.

41 Q. Have any of the officers in your Society devoted more than 10%?

A. Oh, yes; Mr. Ruess devotes most of his time. He is the contact man for the radio station with the board of directors. I would say, yes, Mr. Ruess devotes quite a bit more than 10%; I would not undertake to say what per cent of his time and efforts he gives to it. He is also chairman of our board of auditors."

Mr. Crossman: May I inquire, Mr. Stewart, are you [fol. 84] now reading beyond the offer which you gave to the reporter, defined by certain questions and pages; are you reading beyond that offer?

Mr. Stewart: No. I am offering each of these questions and answers.

Mr. Crossman: I know, but may I ask the reporter to read to me what Mr. Stewart originally offered of this deposition? It seems to me that this is beyond your original offer.

Mr. Stewart: I said commencing on Page 105, I believe.

(Offer read by the reporter.)

Mr. Crossman: Without limitation.

Mr. Stewart: Without what? I don't know what you mean. If you are directing your statement to me, I am offering the questions and answers that I am reading.

44 "Q. Is there any other officer that devotes more than 10% of his time to the radio, other than Mr. Ruess?

A. I think Mr. Ruess and Mr. Bradshaw have given more time to it than anybody else. You say the officers?"

Mr. Stewart: And then about a page later. (Reading):

45 "Q. Did you have anything to do with the negotiations for the lease or sale of the station?

A. Personally, no.

46 Q. Those were handled by Mr. Bradshaw so far as the Society is concerned?

[fol. 85] "A. Mr. Bradshaw and our attorney, I presume, for us, and Mr. Gillin, I understand, for the corporation.

47 Q. Was there any committee appointed by the Society in connection with the leasing or sale of the station?

A. No. As I told you a while ago—I told you what my recollection is—and the minutes will show authority of the board, that it was left largely to Mr. Bradshaw to see if he could make a favorable disposition of the radio station, either by sale or lease.

48 Q. Mr. Newberry, you now have before you a record, the minutes of the Society?

A. Minutes of the board of directors from August 25th to 31st, 1942. Here is the president's report to the board with reference to the radio station.

49 Q. You are reading from the minutes of the board of directors meetings held between August 25, 1942 and August 31, 1942?

A. That is right.

50 Q. Mr. Newberry, calling your attention to the document which you have produced marked 'Minutes of the Board of Directors Meeting of the Woodmen of the World Life Insurance Society held in Miami, Florida, February 27th, to March 9th, inclusive, 1942', and to the statement with reference to the sale of radio station WOW: Is that a part of the minutes of that meeting?

A. Yes.

51 Q. Were you present at that meeting?

A. Yes.

[fol. 86] "Mr. Stewart: Rather than read that into the record, Mr. Wells, could a copy of that be furnished and put in the record?

Mr. Wells: Ask him to have a copy made of that and inserted in the record.

52 Q. Will you do that, Mr. Newberry?

A. Yes.

53 Q. And while you are doing that you better make several copies, because there will be several copies of the deposition.

A. Yes, I will.

By the Notary: Copy of records of minutes furnished by the witness to be made a part of his deposition are attached hereto and made a part of this deposition following Exhibit A.

54 Q. Then the next reference in the minutes to the lease or sale of the radio station is found in the record of the minutes of the board of directors meeting of the Society held on August 25, 1942?

A. Yes.

55 Q. That is in a report by President Bradshaw headed 'Radio Station'?

A. Yes; in which he gives an account of the fact that he has tried to negotiate for the sale or disposal of the station.

56 Q. Will you also make a copy of what appears under that heading 'Radio Station'?

A. Yes."

[fol. 87] Mr. Stewart: Three or four questions later. (Reading):

57. "Q. Now, what is the next record with reference to the sale or lease of the radio station?

A. There is no other record, Mr. Stewart.

Mr. Wells: In the minutes here.

A. (Continued) Oh, in these minutes, now, this is a report of the committee of the board of directors on that part of the special committee which discussed the proposed sale or lease, and here is what they recommend. Sovereign Hines, chairman of this committee, is making this report.

58. Q. That is the report that was made to the board of directors of that session commencing August 25, 1942?

A. That is right.

59. Q. And is followed by a resolution?

A. Authorizing the sale or lease, and there is the vote.

60. Q. Will you also furnish a copy of that report and resolution and the vote on the resolution?

A. Yes.

61. Q. I note on the resolution that paragraph one reads: 'That the President be and he is hereby authorized to negotiate sale or lease, or lease and sale, subject to the lease, of the Radio Station, property and assets, other than cash and accounts'—then there was added to the resolution 'above $25,000.00'', and then that was stricken out.

A. That was an error and it was stricken out. I remember that "was discussed in there, but it was decided that [fols. 88-96] should not be a part of the resolution, leaving the matter to the president to make the best deal he could."

Mr. Stewart: About a page. (Reading).

62. "Q. Mr. Newberry, did any of the members of the board of directors vote against the resolution authorizing Mr. Bradshaw to negotiate a sale or lease or other disposition of the radio station?

A. It is right here; you saw it a minute ago; the votes were all 'aye'—that is, I think you read it; it is the vote taken on that resolution that day.

63. Q. Did you personally make any investigation of the proposed lease of the radio station, or did you rely on the statements concerning it that were made by Mr. Bradshaw?

A. Well, we relied on his making the arrangements. I read the lease when it was drawn, of course.

64. Q. Did you make any effort yourself to either lease the station or sell it?

A. Oh, no, not personally, no."

* * * * * * * *

[fol. 97] FARRAR NEWBERRY called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

128 Q. Mr. Newberry, state your name and business.

A. My name is Farrar Newberry, and I am Secretary of the Woodmen of the World Life Insurance Society.

129. Q. How long approximately have you held that position?

A. Since March 15, 1937.

130. Q. Is this a correct statement as to the Woodmen of the World Life Insurance Society, that it has been a corporation since approximately 1890, organized and existing under the laws of the State of Nebraska as a Fraternal Beneficial Association, with its principal office in Omaha, Douglas County, Nebraska, and organized and existing for the sole benefit of its members and their beneficiaries?

A. Yes; it was incorporated in 1891, I believe.

131. Q. Approximately, what are the assets of the company?

A. I have the latest figures of the gross assets, I believe, here. The gross assets as of December 31, 1942 were $136,025,282.01.

132. Q. Approximately, how much insurance does it have in force?

A. I will say that from memory—about $370,000,000. I don't have that figure right here.

133 Q. About how many members does it have?

A. About 335,000.

134. Q. Is Homer H. Johnson of Lincoln, Nebraska, the plaintiff in this case, a member of the Woodmen of the [fol. 98] World Life Insurance Society at the present time?

A. I understand he is.

135. Q. You have the records under your control of the members of the Society?

A. Yes. The records have been looked up, Mr. Stewart; I didn't look them up personally, but Dr. Johnson is a member.

136. Q. And has been for many years?

A. I think so.

137. Q. Is this a correct statement of the officers of the Society; De E. Bradshaw, President; T. E. Patterson, Vice-President; Farrar Newberry, Secretary; William Ruess, Chairman of Auditors; W. C. Braden, Auditor; R. E. Miller, Treasurer; and Sterling C. Holston, Escort?

A. So far as you go, that is correct.

138. Q. Are all of those individuals I have just asked you about members of the Board of Directors?

A. They are.

139. Q. Are there any other members of the Board of Directors that reside in the State of Nebraska?

A. No.

140. Q. Do you have the records of the proceedings of the Sovereign Camp of the Society with you here in the Court Room?

A. The Sovereign Camp?

141. Q. Yes.

A. No, I do not.

[fol. 99] 142. Q. Are such records kept under your supervision?

A. They are.

143. Q. Is there a printed record made of the proceedings of each Sovereign Camp?

A. There is not, but my attention was called to this other statement here in which the stenographer said I said "yes". I did not say "yes"; they have not been printed in twenty years.

144. Q. The other statement you refer to is the answer that was made when your deposition was taken in this case a few months ago?

A. That is right.

145. Q. And the reporter that took the deposition shows that your answer to the question as to whether there was a printed record made of the proceedings of each Sovereign Camp, was yes: you say that is incorrect?

A. I think so. I don't see it right now. I was told I made that answer; I did not make that answer, not if I

understood your question or wasn't crazy. We haven't done that in over twenty years. We used to do that and it was quite an expensive operation. It was wholly unnecessary for the gist of the Sovereign Camp was printed for every member to read in our National magazine.

146. Q. How much of your time, approximately, did you devote to the Radio Station prior to the time it was leased to the new company?

A. Mr. Stewart, in percentage of the time, I couldn't say. I answered your question before to the best of my knowledge, when I told you that I personally took no great credit for the success of the radio because of any large amount of [fol. 100] time that I gave to it; that I had on occasion served the Fraternal Societies of the National Fraternal Society and our own Society by speeches and arrangement of programs, notably the program by which this Society celebrated its 50th Anniversary nearly three years ago.

147. Q. Well, Mr. Newberry, I don't care for any more of that answer because I don't believe it is responsive. I will ask you another question: When your deposition was taken heretofore mentioned, were not you asked the question: what would you say as to your time devoted to the radio station being more or less than 10 per cent, and didn't you reply—"Well, I could not say that I have devoted more than 10 per cent of my time"—(interrupted).

Mr. Crossman: Objected to as a very improper way of questioning this witness, attempting to impeach him without asking him a direct question, asking him whether in a deposition he testified so and so when he hasn't testified here as a witness about the same subject matter.

The Court: Oh, I will let him answer; he may ask the question.

A. Now, do you want me to answer the same question?

148. Q. Yes.

A. I answer it exactly the same way.

149. Q. The same way I asked it?

[fol. 101] A. That is, I could not say I gave in percentage of the days working hours more than ten percent.

150 Q. Did any of the other officers of the Society devote more than ten percent of the time to the radio station?

A. Yes; I think so. I am sure Mr. Ruess, who is the contact man between the radio and our Board of Directors, the Society, gave a great deal more than that.

151 Q. Anyone besides Mr. Ruess?

A. It took a lot of Mr. Bradshaw's time for months. I would say with a lot of deliberation that it did take more than that much of pereent of time, but I think, Mr. Stewart, that we can't judge it just by hours.

152 Q. Well, I don't care for your voluntary statement, Mr. Newberry, we will make up a good record here and get those matters in. Is there any other officer besides those that you have mentioned that have given ten percent or more of their time to this station?

A. I couldn't say so, of the officers, no. It has taken a great deal more than that of our general attorney's time; I am sure it has—the last few months at any rate.

153 Q. Did you have anything to do with the lease or sale of the station?

A. No; a particular resolution instructed the president—— (interrupted).

Mr. Stewart: Just a minute, Mr. Newberry—if you will, [fol. 102] just answer my question.

A. No.

154 Q. And then I will ask you another one. By whom were those negotiations handled so far as the Society is concerned?

A. By the president, Mr. Bradshaw.

155 Q. Do you have the custody of the minutes of the Board of Directors meetings?

A. I do.

156 Q. Do you have those with you in the court room?

A. I think we have some of those here, yes sir. I thought you would want them and I sent for them. Now, which ones do you want?

157 Q. Do you have the minutes of the meeting of the Board of Directors that was held on August 25, 1942?

A. I think so. My assistant secretary is in the Chamber; if you will permit him to bring them up—I think he has them.

158 Q. Let me ask you another question first, Mr. Newberry, if I may; what is the first record of the Board of Directors relating to a disposition of the radio station?

A. I think the first is the Board meeting of October 25, 1937, held in Omaha, Nebraska.

159 Q. Did you furnish a true copy of the record of that meeting to the reporter when your deposition was taken?

A. Yes, shortly after it was taken.

160 Q. Do you have the original minutes there before you now?

A. I do.

[fol. 103] 161 Q. And the first reference to a disposition of the radio station is shown as of what date in the minutes of the Board of Directors?

A. The resolution is as of October 30th, 1937.

162 Q. Do you have a copy of that resolution, Mr. Newberry, that can be put in in place of the original?

A. Here is a copy, right here (indicating).

Mr. Stewart: We offer in evidence the resolution of the Board of Directors relating to the radio station, dated October 30, 1937, of which I will offer the original resolution but if it is agreeable to the attorneys for the defendant, we will substitute a copy to avoid mutilating your original records.

163 Q. The copy has now been marked Exhibit 5; is that correct, Mr. Newberry?

A. That is correct.

The Court: It is received in evidence.

Exhibit 5 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 104] EXHIBIT "5"

Excerpt from the minutes of the Board of Directors, Woodmen of the World Life Insurance Society in meeting at Omaha, Nebraska, October 30, 1937.

President Bradshaw: I recognize Sovereign Mooney.

Director Mooney: I have a resolution to present, Mr. President. It reads:

Resolution

We were apprised by President Bradshaw in his report, of the many problems confronting the management of the Society in the ownership and conduct of Radio Station WOW. These problems are briefly stated as those governing our relationship with ASCAP, the American Federation of Musicians, the Federal Communications Commission and the problem of increased taxation.

In view of the above and other possible difficulties,

Be It Resolved by this Board of Directors, that if, in the judgment of the President, concurred in by the Finance Committee, it should become advisable to sell or otherwise dispose of the Radio Station, full power is hereby vested in the President to make such disposition of the same as may be deemed advisable.

Director Mooney: I move the adoption of the resolution.

Director Hines: I second the motion.

President Bradshaw: You have heard the reading of the resolution. Are there any remarks? (None) All those in favor of adopting the resolution, let it be known by saying "Aye." Contrary "Nay." The "Ayes" have it and the motion prevails.

[fol. 105] 164 Q. Was there any report of the president that related to the radio station and which resulted in the resolution that has just been offered in evidence?

A. Yes; there was something in the president's report.

165 Q. Now, what is the date of the report of the president?

A. October 25th.

166 Q. 1937?

A. 1937.

By the Court:

167 Q. To whom was this report made?

A. To the Board of Directors.

168 Q. Do you have a copy of the excerpt from the president's report that relates to the radio station?

A. I have.

169 Q. Is Exhibit 6 a copy of the excerpt from the president's report relating to the radio station?

A. Yes sir; that is a copy.

170. Mr. Stewart: We offer in evidence Exhibit Number 6.

Mr. Massey: No objection.

The Court: It is a copy?

Mr. Stewart: It is a copy of the original.

The Court: It is received.

Exhibit 6 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 106] EXHIBIT "6"

Excerpt from the report of President De E. Bradshaw on Radio Station WOW made to the Board of Directors of the Woodmen of the World Life Insurance Society at its meeting of October 25, 1937 held in Omaha, Nebraska.

With increasing service, which the station is rendering, there is of necessity an increase in the cost of operation. We have been able, through the sale of time on the air, to meet these costs and to show a net return on our investment.

We have had many problems and new ones are constantly arising. In our efforts to maintain the efficiency of our assigned frequency of 590 KC, we have been forced to defend, at considerable expense, before the F. C. C., our frequency.

The Nebraska Legislature, at its last session, enacted a law regulating the sale of copyrighted music. ASCAP has filed an action to enjoin the application of this law, a hearing was held before the federal court, decision has not yet been rendered.

The American Federation of Musicians recently made demands on the Broadcasting industry, one of which was that stations employ additional musicians to the amount of five million dollars annually. Negotiations have been entered into and at this writing are still pending. Unless very material modifications can be effected in these demands, it will place a very heavy financial burden on the individual stations, as well as restricting freedom of action in program building.

[fol. 107] 171 Q. In this Exhibit 6 the same excerpt that was furnished by you and attached by the reporter to the copy of your deposition?

A. It is.

172 Q. Is that a complete copy of the president's report relating to the radio made at that time?

A. No; it is not. You see, this relates to radio too (indicating).

173 Q. Well then, the excerpt Exhibit 6 isn't the complete statement of the president on the radio?

A. Correct; it is not.

174 Q. In addition to that there is about half a page on the preceding page: is that correct?

A. Yes.

175 Q. Will you read that into the record?

A. (Witness reading) The operation of Radio Station WOW has been eminently satisfactory during the period covered by this report.

In its primary objectives which are two-fold much progress has been made. First, as a means of contact with a large number of our members. In keeping the name of our Society before the public daily it serves as a splendid avenue along with other media in stimulating membership interest.

As a means of public need and necessity it is also functioning in an effective manner along informative, educa-
[fol. 108] tional and charitable lines. Through our news department it brings the news several times daily to its large listening audience. Through its Sunshine Club it brings cheer and comfort to many shut-ins and invalids, and by means of the contributions much charitable work is being done. Through the "Job Clinic" on Sunday nights more than 500 unemployed secured permanent work during the past four months. This is a fine achievement and elicited a public testimonial from the Director in charge of the Douglas County Assistance Bureau.

176 Q. Then after what you read appears the excerpt Exhibit 6: is that correct?

A. That is right.

177 Q. Now, what is the next record of the president or Board of Directors that refers to the radio station?

A. The next Board meeting.

178 Q. Your next report of the president to the Board?

A. The meeting March 5th, 1942.

179 Q. Now, what came first at that meeting, Mr. Newberry, with reference to the radio station?

A. Here are the minutes of a statement made in executive session of our Board meeting on March 5, 1942, by the president.

180 Q. Now, will you turn to that in the original record, Mr. Newberry: do you have a copy of the president's report that you have just referred to?

[fol. 109] A. Of the president's statement, yes.

181 Q. As it relates to the radio station?

A. Yes.

182 Q. Will you produce it so I can have it identified?

A. Can I verify it first?

183 Q. Yes, sure.

A. I want to be sure. I would answer yes, in part.

184 Q. Is Exhibit 7 a copy of the report of the president that you have just referred to, that relates to the radio station?

A. It is a copy of the statement referred to in part.

185 Q. Well, in the copy that you furnished I see a couple of stars between two of the paragraphs: does that indicate an omission?

A. Yes.

186 Q. And there are two paragraphs that are not found in Exhibit 7 that are contained in the original record: is that correct?

A. Yes.

Mr. Stewart: We offer in evidence Exhibit 7.

Mr. Wells: No objection.

The Court: Received.

Exhibit 7 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 110] EXHIBIT "7"

Excerpt from Proceedings of the Executive Session, Board of Directors, Woodmen of the World Life Insurance Society at Miami, Florida, March 5, 1942

Executive Session.

President Bradshaw made a statement concerning his activities in developing a plan to sell Radio Station WOW. He told of the difficulties to be encountered in getting a satisfactory group of persons together to purchase the station. The government will not permit the transfer of a license except to persons agreeable to the Federal Communications Commission (FCC). He explained that because the license was temporary and because the Station could not be operated without a license, it appeared to be the idea of the government officers to approve the selling of a radio station at a price based upon income.

He said inquiries instituted by persons familiar with the FCC had indicated that the FCC might approve a sale of Radio Station WOW for a sum somewhere between $650,000.00 and $800,000.00.

He suggested that one of the excuses for the initiation of the bill was that Radio Station WOW did not pay taxes

and had been making money. The proponents of the bill do not state that the radio had operated many years at a loss and had only recently been able to operate at a gain.

He stated that he had contacted three different persons with different plans, and that he believed that he could sell the radio station to one or the other of these groups, but that he had not been able to make any commitment and would not know, unless the Board gave the authority to sell the property; that he had made the investigation after different members of the Board had heretofore instructed and that his verbal report covered the facts which had been developed by him and Director Ruess.

After much discussion of the subject Director R. E. Miller moved that the President be authorized to negotiate and make a sale of the property for the best price obtainable. Said motion was seconded by Director Braden and put and unanimously carried.

[fol. 111] 188 Q. What is the next record of the Board of Directors relating to the radio station?

A. The meeting of August 25, 1942, in Omaha, Nebraska.

189 Q. Mr. Newberry, is there any record of any action taken by the Board of Directors at the session commencing March 5, 1942, with reference to the radio station?

A. I find here a resolution authorizing the lease or sale.

Mr. Stewart: Well now—repeat the question.

190 Q. (Repeated by reporter.)

A. There was action.

191 Q. On what date?

A. The resolution of August 31, 1942.

192 Q. Now, that was not the same session as March 5, 1942?

A. No, sir.

193 Q. My question was, was there any action taken at the session commenced March 5, 1942 with reference to the radio station?

A. There apparently was not any.

194 Q. All right. Then what is the next record relating to the radio station, of the Board of Directors or of the president?

A. August 25, 1942.

195 Q. And what is that record?

A. Now, here is an excerpt from the president's report to that meeting of our Board: it is quite a lengthy thing here.

196 Q. Will you turn to that in the original record?

A. Now, that is the record of August 25, 1942 (indicating).

[fol. 112] By Mr. Crossman:

197 Q. Is that the statement of the president to which you are referring?

A. That is right, on the radio station.

Q. You have a copy of that report of the president that relates to the radio station?

A. I have a copy of quite a bit of it. I would have to run through it here to see if it covers everything said about the radio station. (Witness compares copy.) O. K.—I will say, yes.

199 Q. Is Exhibit 8 a copy of the president's report that we have just referred to?

A. It is.

200 Q. And which was submitted to the meeting of the Board of Directors August 25, 1942?

A. It is.

201 Mr. Stewart: Plaintiff offers in evidence Exhibit 8.

Mr. Wells: No objection.

The Court: It will be received.

Exhibit 8 received in evidence, same being made a part of this record, being attached hereto as follows:

[fol. 113] EXHIBIT "8"

Excerpt from the Report of President De E. Bradshaw to the Board of Directors—Woodmen of the World Life Insurance Society at its Meeting August 25, 1942, in Omaha, Nebraska

Radio Station

Complying with your direction at the last meeting, I continued my efforts to dispose of the Radio Station. An interested group of men were contacted and the NBC agreed to help in finances if it could be satisfactorily arranged. It occurred to me that sale could be made. In fact NBC had agreed to go along with the proposition to the extent of two or three hundred thousand dollars or more.

Having had several conferences with the President and others of NBC it was discovered that the federal taxation problem, as it now exists and as contained in the proposed new tax bill, and as will necessarily be increased in subsequent bills, was so serious that there did not seem to be any way whereby a purchaser of the Station would ever be able to make enough out of it to pay for the Station and pay the taxes.

In order that you may see the difficulties arising in reference to taxes, I make the following quotation from Paul Mallon's column "News Behind The News":

"The corporation tax rate was fixed by the house at 45 per cent of net income and 90 per cent of excess profits, so offhand anyone would figure that business would be able to earn at least half of what it earned in pre-war days. Apparently that was what the house thought.

But when the senate committee started prowling into the complicated new administrative restrictions on interest payments, altered allowances for debt retirement, and provisions forcing business to abandon its fiscal year system, it discovered the bill would throw a lot of business into the unprofitable class.

For instance, the Glidden Company, of Cleveland, Ohio (making cuprous oxide for shipbuilding and paints) showed [fol. 113a] its profit margin had been cut so much by taxes and price ceiling that a change in its fiscal year bookkeeping system to the calendar year, would leave it $498,674 short of being able to meet its taxes this year.

In other words, it has planned for its taxes on a fiscal year basis, and thus has made insufficient provisions to pay its taxes under the house scheme.

The Utah Power and Light Company presents its books, estimating its taxable income for this year at $3,198,872, its normal tax at $1,000,269, its excess profits tax at $963,576, allowing only $1,225,000 to meet its legally required preferred stock dividends of $1,704,000. Its indicated deficiency was 481 thousand dollars. Business men rarely have produced their books before at tax hearings, but there was no hesitancy this time).

Any concern with large increased sales and cost, heavy debts, or a fiscal year ending around June or July, would be in somewhat the same circumstances. It is therefore a foregone conclusion the senate committee will considerably alter

the complicated technical administrative features of the house bill, and may even trim the corporation rates."

I have taken up with some Senators this tax question as it applies to new corporations and have shown, by facts and figures, the impossibility of a new corporation of any considerable earnings being brought into existence to survive or compete against corporations already established.

Our own tax specialists, and those of NBC and one we contacted in Washington, and another that we hired here in Omaha, all reached substantially the same conclusion as to amounts of earnings which would be taken by federal taxes.

Having failed in this effort, after many conferences in New York and Washington, and with the persons financially interested, it was determined that we would undertake "A Lease Agreement" by which the station would be leased at so much. My idea was that there should be paid in for a lease agreement at least $150,000.00 cash and that in addition thereto the persons desiring the lease would pay into a capital fund at least $100,000.00 so that we might be assured that the lease contract would be carried on. We had a group of local business men interested. They were among the strongest men in the city financially. They have plenty of [fol. 113b] money and are looking for investments.

The tax problem again arose. They consulted their attorneys locally, and the tax people in Washington, and contacted some attorneys and other agencies in Washington, and they finally determined that they would not be able to go on making the cash advance payment as suggested.

Afterwards we got another group interested, equally as solvent as the first mentioned. Some of them had such important businesses as brought them in contact with Washington authorities, and they had conferences there, and even contacted the FCC and some Senators, and finally they decided that they would not go forward.

We then revived the proposition with some of those mentioned, plus some other individuals in the city and some individuals in New York, on the proposition that we would make a straight lease at so much per month without requiring the payment of $150,000.00 in advance, provided that enough capital be raised to guarantee the continuing of the operation of the station and proposing a lease for fifteen years on that basis.

Again those persons were consulted and lawyers in New York, and tax specialists in New York and Washington. Mr. Gillin went to New York and Washington without success on that plan.

Then we contacted another group and negotiations are still pending on the basis of a lease for fifteen years, so much per month, providing a capital fund would be raised sufficient to carry the station on in the event of a failure of receipts for a few months at a time.

This is now being considered by New York and Washington authorities. Mr. Gillin contacted our attorney in Washington, the NBC tax specialists, the NBC attorneys in Washington, some Senators, Mr. Fly, the Chairman of the FCC, the General Attorney of the Commission and the [fol. 113c] Assistant Attorney of the Commission. We got no definite promises. The one serious objection to this proposition is that the FCC does not believe in a lease in the first place and in the second place does not want the owners of the station to live away from the community in which the station is operated.

After all, we must get permission of the FCC to make the lease and if that cannot be obtained, the lease cannot be made, so that it is among the probabilities that we cannot close this lease.

Substantially all radio time is taken up outside of necessary sustaining programs by commercial contracts.

We are not unmindful of the fact that the economic situation is such that persons with money do not like to put it at risk in a business as new and as uncertain as the radio business. It is so strictly controlled and is so responsive to business gains and failures as to deter the ordinary careful and prudent person from making an investment and putting as much of his investment at risk as would be available at normal times.

The morning World Herald of August 14th carried a dispatch to the effect that FCC is conducting hearings and planning on curtailing the hours of broadcasting in order to conserve property. It is difficult for us to see how this would conserve property except electricity, but that activity on the part of the Commission is only an indication of what we may expect in reference to regulation and consequently reduction of return.

[fol. 114] 202 Q. What is the next record of the Board of Directors relating to the radio station or any report of the president with reference to it?

A. The resolution of August 27th, 1942.

203 Q. You have a copy of that report of the committee?

A. I have.

204 Q. Is Exhibit 9 a true copy of that report dated August 27th, 1942?

A. It is.

205 Mr. Stewart: We offer in evidence Exhibit Number 9, being the report of the committee dated August 27th, 1942, being a copy of the original.

Mr. Wells: No objection.

Exhibit 9 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 115] EXHIBIT "9"

Report of a special Committee to the Board of Directors, Woodmen of the World Life Insurance Society at its August 31, 1942 meeting—Omaha, Nebraska.

Sovereign Hines: Mr. President, I have a report to submit. It reads:

Omaha, Nebraska August 27, 1942

To the President and Directors Woodmen of the World Life Insurance Society Omaha, Nebraska

Esteemed Sovereigns:

The undersigned special committee has considered and discussed at length the proposed sale or lease, or both, of the radio station, and we report and recommend as follows:

1. That we believe a sale or lease, or both, of the radio station as proposed by the President is desirable and for the best interest of the Society, and recommend that he be authorized to continue negotiations.

2. That a resolution authorizing such sale or lease, or a sale subject to lease, be adopted at this meeting. The proposed form of resolution is attached.

Respectfully submitted,
(Signed) Chas. A. Hines, William E. Mooney, Robt. G. Plunkett, W. C. Braden.

[fol. 116] 206 Q. What is the next record of the radio station with reference to the station, of the Board of Directors?

A. The resolution of the same date offered by Mr. Charles A. Hines.

207 Q. You have a copy of that resolution and of the action taken on it?

A. I have.

208 Q. Is Exhibit 10 a copy of that resolution?

A. It is

209 Mr. Stewart: We offer in evidence Exhibit 10, being a copy of a resolution relating to the radio station.

The Court: It is received.

Exhibit 10 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 117] EXHIBIT "10"

Resolution authorizing Lease or Sale, or Sale subject to Lease, of Radio Station.

Be It Resolved, by the Board of Directors of the Woodmen of the World Life Insurance Society:

I

That the President be and he is hereby authorized to negotiate sale or lease, or lease and sale, subject to the lease, of the radio station, property and assets, other than cash and accounts above $25,000.00.

II

That upon sale or lease, and/or any sale of the property after it has been leased, has been negotiated and is satisfactory to the President, he and the Secretary are authorized to execute any and all necessary instruments to effectuate such sale or lease, or both, in form to be approved by them and the General Attorney.

(Signed) Chas. A. Hines

Sovereign Hines: I move the adoption of the report.

Sovereign Braden seconded the motion to adopt the report.

A general discussion was had on this subject.

President Bradshaw: Any further remarks?—All those in favor of adopting the report and resolution will let it be known by saying "Aye". Contrary "Nay". The "Ayes" have it and the motion prevails.

[fol. 118] 210 Q. Now, is there any further record of the proceedings of the Board of Directors or any committees or reports of the president relating to a disposition of the radio station up to the time when this present action was filed?

A. No.

The Court: Are you asking now with reference to this last transaction or at any time?

Mr. Stewart: At any time.

211 Q. Now, what record is there subsequent to the filing of this action relating to the disposition of the radio station?

A. None, I believe, except that the president reported to a special meeting held December 1st, I believe, in which he simply stated that the negotiation was under way for the transfer of the license.

212 Q. Do you have a copy or the original of that record?

A. I don't think I have. I thought I had a copy here, and I have misplaced it.

213 Q. Do you have the original record with you?

A. No.

214 Q. Will you bring the original record with you tomorrow?

A. I don't know that the record is bound up; I certainly will be glad to bring you the part—I have a copy of it here now—I haven't it.

215 Q. Will you bring the original record with you tomorrow, Mr. Newberry, please?

A. Yes.

[fol. 119] The Court: Also bring a copy with you.

216 Q. Mr. Newberry, on the resolution adopted August 31, 1942, on the original there appears after the word "Accounts" at the end of the second paragraph, these words that have been added over in the margin: "above twenty-five thousand dollars," and then those words "above twenty-five thousand dollars" have been struck out, can you explain that?

A. No, sir, except the stenographer probably thought she heard somebody correct it in the Board meeting and scratched it out without thinking. It ought to be in there; that was a part of the resolution. I notice that there is a line scratched through the word "above" and the amount "twenty-five thousand." That was a part of the resolution; that ought to have been in there as it is in the copy that I have here.

217 Q. Well, when your attention was called to that at the time your deposition was taken in this case that has been previously mentioned, didn't you state with reference to those words "above twenty-five thousand dollars," that was an error and it was stricken out; I remember that was discussed in there but it was decided that should not be a part of the resolution leaving the matter to the president to make the best deal he could?

A. There was some discussion of it, Mr. Stewart, and I may have been under that impression when you quiz-ed me a few months ago. I am not clear whether that is correct or not. There was some mention of it, some discussion made there, and I just have the impression now that [fol. 120] the girl who was taking the notes, somebody said that is an error and shouldn't be there and it was inadvertently scratched through. Now, I could be in error on that. If you will show me my——(interrupted).

218 Q. Calling your attention to your original deposition —have I read the answer to my previous question to you correctly? (Counsel shewing deposition to witness)?

A. Well, that is the impression that I had when you were asking me, and that may be correct.

219 Q. Well, the point is you did so answer?

A. Oh, yes; oh, yes, there is no question about that, if it is there.

220 Q. The record of the Sovereign Camp of the Society is kept under your supervision?

A. It is.

221 Q. Is there any record in those proceedings relating the sale or leasing of the Radio Station?

A. I think not, Mr. Stewart, but to answer that accurately I would have to go through these last few years and read them carefully.

222 Q. Will you do that or have someone in your office do it and advise us tomorrow if there is any record in the Sovereign Camp?

A. Yes, if we can get it done by tomorrow. I am confident there is not but to be accurate I would like to look them through.

223 Q. But when your deposition was taken, Mr. New-
[fol. 121] berry, I asked you then at that time if you would please examine the record with reference to the Sovereign Camp and if there was any record relating to the leasing of the station, if you would furnish a copy, and you answered you would be glad to, and you have never found anything.

A. Yes, and the Secretary looked through and traced it, and I am confident there isn't anything there or you would have had it.

224 Q. Did you personally make any investigation of the proposed lease of the radio station, or did you rely on the statements concerning it that were made by Mr. Bradshaw?

A. We relied largely on the information given to us by President Bradshaw after his conferences with the various parties with whom he was contemplating making the deal.

225 Q. Well, you said you relied largely on that?

A. Yes.

226 Q. What else did you rely upon?

A. Well, we were expected to have some little judgment ourselves when facts were presented to us at our round tables, our meetings, discussing these things.

227 Q. Did you make any effort yourself to try to lease the station or sell it?

A. No, I did not.

Mr. Stewart: I believe that is all.

[fol. 122] Cross-examination.

By Mr. Wells:

228 Q. Mr. Newberry, what was the net income of the radio for 1936?

Mr. Stewart: That is objected to as not cross-examination.

The Court: I don't think that is proper cross-examination; he didn't go into that on direct examination. If he did, I didn't get it; it might be in some of those reports that I didn't get.

Mr. Wells: Well, do I understand the court we are limited at this time to cross-examination, and if we want to examine in chief, put him on as our witness?

The Court: Certainly.

229 Q. Mr. Newberry, who are the other directors of the Woodmen of the World Life Insurance Society other than those who reside in Omaha, and where do they live?

A. Mr. H. E. Klugh, Harrisburg, Pennsylvania; Robert G. Plunkett, Macon, Georgia; William E. Mooney, Chicago, Illinois; Charles A. Hines, Greensboro, North Carolina; Rev. William M. Crawford, Birmingham, Alabama; T. A. Heise, Columbia, South Carolina; John J. Wahl, San Antonio, Texas. I believe that is all.

230 Mr. Wells: If Your Honor please, owing to Mr. Newberry's condition, is there any objection to excusing him until morning?

The Court: No, we will do that.

Mr. Wells: Then you may be excused until morning, Mr. Newberry.

(Thereupon an adjournment was taken until 9:30 o'clock A. M. March 2, 1943.)

[fol. 123] 9:30 a. m., March 2, 1943.

Court convened pursuant to adjournment, same parties present as before, and the following proceedings were had:

* * * * * * *

[fols. 124-128] (Counsel reads Sections 1, 4, 26a and 28a.)

240 The Court: That was the Constitution in effect when this took place.

Mr. Wells: I should have said this is the Constitution and By-Laws enacted in 1941, effective September 1, 1941, (Ex3) which is the last Sovereign Camp session, the last enactment of the Sovereign Camp, and the 1939 is the next one previous to that—these two are the last Constitution and By-Laws enacted by the Sovereign Camp.

Plaintiff yesterday in the examination of Mr. Newberry, Secretary of the Society, identified and had introduced in the record an excerpt from the Report of Mr. Bradshaw, as President, that he made to the Board of Directors, on

October 25, 1937, in Omaha, Nebraska, and I desire to read that report.

(Counsel reads Exhibit 6.)

. . . . . .

[fol. 129] WILLIAM RUESS, called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

270 Q. Mr. Ruess, will you please state your name, residence and business?

A. William Ruess; 3817 Dewey Avenue; I am a member of the Board of Directors of the Woodmen of the World Life Insurance Society. I also have the title of Chairman of Auditors and was the Supervising Director of Radio Station WOW.

271 Q. How long have you been the Supervising Director of the Radio Station for the Society, approximately?

A. About ten years.

272 Q. What, in a general way, are your duties as Chairman of the Board of Auditors?

A. Presiding at the meeting of the auditors when they make their periodic audit of the affairs of the Society.

273 Q. Is that all of your duties as Chairman of the Board of Auditors?

A. No; I am the approving officer of all general fund expenditures of the Society.

274 Q. Does that include the disbursement of all funds or just of the general fund?

A. The general fund.

275 Q. What is the general fund used for, for what purpose?

A. For operating the Society.

276 Q. Then as I understand it, you have to approve all [fol. 130] disbursements for the operation of the Society?

A. That is correct.

277 Q. What are your duties as supervising director of the Radio Station?

A. A general supervision of the station, consulting with the General Manager on the various problems that arise.

278 Q. Who has been the General Manager of the Radio Station?

A. Mr. John J. Gillin, Jr.

279 Q. Did he occupy that position up to the time of the transfer of the station to the lessee?

A. He did.

280 Q. And for approximately how many years?

A. Approximately ten years or more.

281 Q. Had you had any training or experience in the radio business prior to the time you became the Supervising Director of the station?

A. No.

282 Q. As I understand it, your duties required you to confer with Mr. Gillin concerning the operation of the radio station?

A. Yes.

283 Q. About how often did you confer with Mr. Gillin?

A. Oh, I would say at least once a day, sometimes more.

284 Q. Did you and Mr. Gillin occupy the same offices?

A. No.

285 Q. About how much time out of each day did you devote to the Radio Station as distinguished from your other duties?

[fol. 131] A. Well, I couldn't fix any definite period, but I would say it is safe to say I devoted fully half of my time to radio affairs.

286 Q. Would a statement that you devoted approximately half of your time to the station be a fair estimate, Mr. Ruess?

A. I think so.

287 Q. So far as the Society was concerned were you in charge of the Radio Station above Mr. Gillin?

A. Substantially so.

288 Q. Did anyone else participate in your conferences with Mr. Gillin concerning the management of the station?

A. Yes; there would be various occasions on which different people were called in to conferences.

289 Q. Who else acted with the Society, participated in those conferences or any of them?

A. Sometimes it was President Bradshaw, sometimes Vice-president Patterson, sometimes the general attorney—depending on the nature of the problem that was before us.

290 Q. When did you first learn that the disposition of the radio station was being considered?

A. Well, it was discussed on a number of occasions.

291 Q. When was the first time that you recall?

A. As near as I recall it was around 1936 or 1937.

292 Q. Was that at the time that the station was moved from the building down on 14th Street to the present location?

A. I would say approximately that time.

[fol. 132] 293 Q. Did that discussion arise before the station had been moved or in connection with determining whether it should be moved?

A. I don't believe so.

294 Q. Was it decided at that time to continue to operate the station?

A. Yes.

295 Q. And when was the next time that the selling of the station was considered, to your knowledge?

A. Well, it was discussed on various occasions; I can't definitely fix any period.

296 Q. Well, is this right, that it was about a year and a half ago that it was next considered?

A. More definitely.

297 Q. Did you personally make any effort to lease or sell the station?

A. Not individually. I sat in on several conferences.

298 Q. With whom were those conferences that you mentioned?

A. Well, there were several people.

299 Q. Name them, Mr. Ruess.

A. At one time the Swanson family.

300 Q. Who else?

A. And then later, when the other group got together, I was in on one or two conferences there.

301 Q. Now, are those the only conferences in which you participated?

A. The only conferences at which all of those were present. There were other discussions of the matter between the officers at various times.

302 Q. When was that conference with the Swansons, approximately?

[fol. 133] A. I can't fix the date but it was early in the summer or spring of last year.

303 Q. Did you personally have anything to do with fixing the rent named in the lease?

A. Only to confirming the findings made by our bookkeeping department.

304 Q. Who was in charge of the negotiations for the disposition of the radio station?

A. President Bradshaw.

305 Q. And did he conduct most of those negotiations?

A. He did.

306 Q. Do you know of any efforts to lease or sell the radio station other than those made by Mr. Bradshaw?

A. No; I don't.

307 Q. Now, you say you had a conference with the group that were interested in the new company that leased the station: is that right?

A. Yes.

308 Q. Did you have more than one meeting with that group?

A. I don't recall how many meetings I attended.

309 Q. Isn't it a fact, Mr. Ruess, that you only participated in one meeting with that group?

A. Well, there was one meeting, and then when the final lease was drawn up; I was present when, I say, it was being signed, at the time.

310 Q. Well; that is the only meeting you were present [fol. 134] with that new group, isn't it, Mr. Ruess?

A. I believe so; that personnel of it changed so I can't fix definitely who was present at each meeting.

311 Q. And that meeting was, you say, at the time of the meeting the lease was signed up by the new company?

A. I was present then.

312 Q. Do you recall the date that the lease was signed?

A. No.

313 Mr. Crossman: I think there is no question about that: it is admitted in the record it was October 13, 1942.

The Witness: I don't recall the date.

314 Mr. Crossman: I mean just between Mr. Stewart and I.

315 Mr. Stewart: I think you are wrong: it is October 3rd.

316 Q. Prior to the date the lease was signed, did you have a conference or discussion with men claiming to represent the World Herald concerning their making an offer for the station?

A. You mean the offer they made several years back?

317 Q. No; I mean one that was made a few weeks before the lease was signed?

A. Yes sir.

318 Q. Do you remember the date?

A. No.

319 Q. About how long was it before the lease was signed?

A. Oh, it may have been a week or possibly two; I don't recall exactly.

320 Q. Now, where did that conference or discussion take [fol. 135] place, Mr. Ruess?

A. In one of the offices in our building.

321 Q. And who was present at that time?

A. Mr. Bradshaw, Mr. Gillin and myself, Mr. Munger and Mr. Vernon H. Smith or V. Smith as we know him.

322 Q. Do you know what connection Mr. Smith had at that time with the World Herald?

A. I understood Mr. Smith was operating the radio station for the World Herald.

323 Q. Do you know what connection Mr. Munger had with the World Herald at that time?

A. As I understand, he was their attorney.

324 Q. Was there anyone else present other than those you have named?

A. No.

325 Q. Did Mr. Bradshaw make any statement at that time as to the least figure the Society would consider for the station?

A. Well, he made no offer to lease to them at the time; he said there were negotiations under way.

326 Q. Do you recall Mr. Bradshaw making the statement that $800,000 would be the least that the Society would consider for the station?

A. I don't recall whether he made that statement, but he said if it was sold it would be cash on the barrel-head.

327 Q. And in what amount?

A. I don't recall that he stated a definite amount.

328 Q. Did he say what he considered the value of the Radio Station?

[fol. 136] A. I don't know whether he said it then but it was said on other occasions.

329 Q. Mr. Ruess, your deposition was taken in this case about a month ago, wasn't it?

A. I think so.

330 Q. To refresh your recollection didn't you at that time state that Mr. Bradshaw referring to the station, said what its value would be if we made a direct sale, and then you were asked what figure was that, and then didn't you answer "Well, he figured that $800,000 would be the least that would be considered." Then you were asked: "Was that what Mr. Bradshaw said?" And did you not answer: "I think substantially that is what he said." Now, does that refresh your recollection, Mr. Ruess, as to the fact that Mr. Bradshaw at that time said $800,000 would be the least that would be considered?

A. I don't recall whether he made that statement in the room, but I know he made those statements on other occasions.

331 Q. Just so you may see the original deposition, Mr. Ruess, I call your attention to the questions and answers as I have just given them: just read those questions and answers to yourself, and say if I have stated them substantially correct?

(Witness examines deposition.)

332 Q. Now, you have read those questions and answers I just mentioned in my question?

A. Yes.

333 Q. And were those questions as appeared in my statement?

[fol. 137] A. I answered them the way they appear there.

334 Q. And that is the way I asked them in my question?

A. Yes.

335 Q. Did Mr. Munger and Mr. Smith say whether they had authority at that time to buy the station?

A. As I recall it they said they had authoirty to make an offer.

336 Q. Did Mr. Bradshaw then make a statement as to whether he would consider an offer from the World Herald?

A. If I remember correctly he said he wouldn't entertain it right at that moment.

337 Q. Did he say why?

A. Because it was—I presume it was because of the other negotiations.

338 Q. Well, did he say it was because of some other negotiations?

A. Well, he referred to the fact that we had another offer.

339 Q. And do you know what other offer it was he was referring to?

A. Yes; it was this lease offer.

340 Q. With the group that finally leased the station?

A. Yes.

341 Q. As I understand it then, Mr. Bradshaw said that he would not consider any offer from the World Herald for the purchase of the station?

Mr. Crossman: That is a bit leading: I think you might ask him what was said; he is leading the witness.

The Court: Oh, I think he may answer.

A. I don't think the wording is correct there; he didn't say he wouldn't entertain any offer.

[fol. 138] 342 Q. Well, did he say he wouldn't entertain any offer until the other group with which he was negotiating refused to take the station?

A. Well, I think what he tried to convey was that unless they came and put the money down on the barrel-head, it would not be considered.

343 Q. To refresh your recollection, Mr. Ruess, I will ask you, when your deposition was taken if you were not asked this question with reference to the conversation with the representatives of the World Herald: "And in that conference that occurred shortly before the lease was executed, what was said then on the subject of leasing or selling the station, in substance?" and did you not answer: "Well, they came up and said they wanted to make an offer, and they intimated that in the event an offer was made, they would move the station out of the building, and Mr. Bradshaw said we had this other proposition before us and until some definite action was taken he couldn't consider another offer; then there was not any further discussion with the representatives of the World Herald." Were you asked that question and didn't you answer it as I have read?

A. I did.

344 Q. And is that substantially correct?

A. And didn't I also say he wouldn't consider a proposisition that meant the removal of the station?

345 Q. Well, so far as this question and answer, is that substantially correct?

[fol. 139] A. That is substantially correct.

Mr. Stewart: That is all.

Mr. Crossman: Shall we proceed with the cross-examination now or take Mr. Myers?

The Court: I think you better take Mr. Myers.

Mr. Crossman: You may step down, Mr. Ruess.

(Witness withdrawn).

[fol. 140] Guy C. Myers, called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

346 Q. Will you please state your name, business and residence, Mr. Myers?

A. Guy C. Myers; Olympic Hotel, Seattle, Washington; I am known as a fiscal agent in the financial field.

347 Q. Do you have an office in New York City, Mr. Myers?

A. Yes, sir.

348 Q. What is the address of that office?

A. 35 Wall Street.

349 Q. How long have you maintained an office there?

A. At 35 Wall Street, I think about seven or eight years.

350 Q. And prior to that time did you have an office in New York City?

A. Yes sir; at 37 Wall Street.

351 Q. For how long approximately?

A. Oh, about four years, I guess, or five years.

352 Q. Where do you live in New York City?

A. 30 Sutton Place.

353 Q. How long have you resided at that address?

A. About five years.

354 Q. Will you state the nature of the business which you are engaged in which you describe as that of a fiscal agent?

A. Well, a fiscal agent performs the duties of the financing, setting up bond issues, of advising them how to secure [fol. 141] money, and in that connection you take care of legal and engineering and accounting and all those things that would go to round out any financial program that any organization might have.

355 Q. Are you a lawyer, Mr. Myers?

A. No; I am not.

356 Q. Or an accountant?

A. No.

357 Q. Have you had experience in the operation of a radio station?

A. No.

358 Q. Or any training?

A. No, none at all.

359 Q. Are you acquainted with Mr. De E. Bradshaw, president of the Woodmen of the World Life Insurance Society?

A. Yes.

360 Q. How long have you known him, approximately?

A. Oh, well, five or six years or so; maybe longer than that.

361 Q. Do you recall where you met him?

A. Yes; I am pretty sure I met him right here in Omaha.

362 Q. Was anyone else present at that time that you recall?

A. Yes, John B. Dawson, his son-in-law.

363 Q. Where does Mr. Dawson live?

A. In New York.

364 Q. What is his business?

A. He is a member of the firm of Thomson, Wood and Hoffman, and they are municipal lawyers.

365 Q. What has been the nature of your acquaintance with Mr. Bradshaw since you first met him?

[fol. 142] A. Well, more of a social acquaintance, although we have talked of business matters and market conditions and things of that sort.

366 Q. About how frequently have you seen him since you first met him?

A. Well, that is a little difficult to say; I don't know—maybe five or six times a year, something like that.

367 Q. And where have you seen him on those occasions, here in Omaha or in New York or where?

A. Well, he has been in New York; I have seen him in New York and I have seen him here.

368 Q. Has the law firm with which Mr. Dawson has been connected represented you, Mr. Myers?

A. Well, they have, yes, in some states looking up law for me covering the municipal—the issuance of bonds in various states and so forth.

369 Q. Are you acquainted with John Gillin, Jr.?

A. Yes.

370 Q. How long have you known him, approximately?

A. Oh, I would think a year and a half, maybe; someplace around there.

371 Q. When and where did you meet him?

A. In Mr. Bradshaw's office.

372 Q. At that time did Mr. Bradshaw suggest to you that you participate in the company that was going to lease the radio station?

A. Well, I don't know that you would say asked me to participate in it, but he said he was going to sell the radio, [fol. 143] and I asked him what kind of a station it was, and what did the radio make and so forth, and he said, well, John Gillin was coming up, he was the manager and he would answer any questions I wanted to know. So when John came up I discussed with him the financial side, and what the station was able to make.

373 Q. Are you connected with the Consumers Public Power District in Nebraska, Mr. Myers?

A. Well, I am their fiscal agent, yes.

374 Q. How long have you been fiscal agent for the Consumers?

A. Since 1936; I think, I believe it was in 1936.

375 Q. As fiscal agent for the Consumers have you assisted them in taking over the power facilities of any utilities here in Nebraska?

A. Yes.

376 Q. About how many?

A. Well, fourteen or fifteen, I think.

377 Q. Does that include the one at Lincoln?

A. Yes.

378 Q. Will you state approximately the purchase price of those power facilities in the aggregate?

379 Mr. Crossman: Now we have come to the point where I wish on behalf of the Woodmen and these individual

officers of the Woodmen, to enter my objection. You will recall, Your Honor, that in advance of trial we filed a motion on behalf of the Woodmen and seven individuals, to strike all of these propaganda allegations about the Con-
[fol. 144] sumers Public Power District, and Your Honor was of the view at that time that the allegations should not be stricken out at that time. I stood by here with all the latitude to develop who Mr. Myers is and what connection he has with the Consumers Public Power. Now, we are about to plunge into the Consumers Power question. It is immaterial and incompetent and has no connection with this lawsuit, all of which is revealed in the deposition Mr. Stewart has taken on his own motion. His own proof shows the Consumers has no connection with this whole transaction. We make the objection again, and I want to make it because we don't want it to go into this record by acquiescence.

The Court: You may answer.

Mr. Crossman: May I suggest then, so I don't need to repeat—may my objection stand to the entire line of examination, except when we get to a new subject matter?

The Court: Well, there will be no objection if there is some other question.

Mr. Crossman: When we come to some other subject matter we will put in further objection.

380 Q. (Repeated by reporter) Will you state approximately the purchase price of those power facilities in the aggregate?

A. Aroun- 47 million dollars—someplace around there.

381 Q. When did you take over the first of those power facilities?

A. 1938, I believe—1938, I think.

382 Q. Wasn't it 1939—to refresh your recollection?
[fol. 145] A. Well now, I will tell you why I waiver there a little bit: we took over the Columbus Division in one year, and then we financed it, I believe, the next year, and whether it was 1938 or 1939—one of those years—it may have been 1939.

383 Q. When was the last one taken over?

A. In January of 1942.

384 Q. Is the Consumers now negotiating for the power facilities of the Nebraska Power Company here in Omaha?

A. Well, they have made a bid for the Nebraska Power Company.

385 Q. What is the amount of that bid?

A. $40,680,000.00.

386 Q. Was that offer made through you?

A. Yes.

387 Q. What is the status of that transaction now? Has the offer been accepted or rejected or what?

A. No; it is in the hands of the American Power and Light; there hasn't been any action taken on it.

388 Q. The American Power and Light—what is their connection?

A. They own the Nebraska Power Company.

Mr. Crossman: I think we are in a new subject matter when we get to the Nebraska Power Company here; I renew my objection and let it stand to the entire line of inquiry.

389 Q. What is the basis of your compensation for your services to the Consumers, Mr. Myers?

Mr. Crossman: I want to renew my objection to this line of inquiry: without repetition may the previous objec- [fol. 146] tion stand to this line of questioning?

A. On the net amount that the District receives from the sale of their bonds, I receive for my services, which includes the expense of engineering, legal and audit, negotiations, etc., two and one-half percent on the first four million, one and one-half percent on the next ten million, and one percent on all over that.

390 Q. Now, is that the basis that applies to your deal involving the Omaha facilities too?

A. Yes; that will average about one and one-tenth percent, someplace along there.

391 Q. And approximately what would be your compensation if the Consumers acquired the Nebraska Power Company facilities?

A. About five hundred thousand dollars.

392 Q. Is that compensation in any way contingent on the Consumers acquiring the power facilities here in Omaha?

A. Yes; they are all contingent.

393 Q. Wholly contingent?

A. Yes, sir.

394 Q. That is, you receive nothing if the deal does not go through?

A. That is right.

395 Q. When did you next have a conversation with Mr. Gillin concerning the radio station? I mean after the day you met him.

A. Oh, I saw him numerous times after that. As I would come here I would talk to him on the 'phone and saw him. I don't recall that we had very serious conversations on it until Oh, maybe about a couple of months before we entered [fol. 147] into the contract.

396 Q. About how many times did you talk with Mr. Gillin concerning the acquisition of the radio station?

A. Oh, that would be a pure guess—numberous, I don't know, several—I couldn't say ten times or fifteen times or what not; I really don't know.

397 Q. Did those conversations take place here in Omaha?

A. Some of them, and one or two of them in New York.

398 Q. Did you have any part in the preparation of a proposed lease of the station?

A. Yes.

399 Q. In what way, Mr. Myers?

A. Well, merely on the fact that it was going to be a lease and to know what the rentals were going to be, and what the conditions and terms were, and the company, the Insurance Society drew up the form of lease, and naturally we discussed, all of us at various times, changes or modifications or what not.

400 Q. Did you have anything to do with having a lease prepared in New York City for the radio station?

A. Now, I don't know. We were talking about a corporation, or the method of setting it up. Now, the lease was discussed, yes, with Mr. Peyton of Breed, Abbott and Morgan, who are attorneys in New York City.

401 Q. That firm represented you at times, Mr. Myers?

A. Yes, they had.

402 Q. And they also represented the Consumers?

[fol. 148] A. No; no.

403 Q. Had they represented the syndicate of bankers that are connected with acquiring the bonds of the Consumers?

A. No.

404 Q. Did you go with Mr. Gillin to the office of Breed, Abbott and Morgan and request that they prepare a lease for the radio station?

A. No; I think Mr. Gillin was up in my office, and we had some questions that he wanted answers from a legal standpoint, so I named several lawyers in town there. He comes there real often on this radio business, and he happened to know Breed, Abbott and Morgan. I said, they are very good people; they are right here in the building; I will call them up. So I called them up and Mr. Peyton came up to my office and we discussed whatever it was, and Mr. Peyton and John carried on their conversation without my being present.

405 Q. Do you know whether that firm subsequently prepared a lease for the station?

A. I think they made some suggestions; I don't believe they ever prepared one though.

406 Q. Do you recall whether that firm also assisted the Society and the lessee in getting the approval of the Federal Communications Commission to the transfer of the license for the station?

A. No; they did not.

407 Q. Was the sale of the station discussed with you, [fol. 149] or merely a lease, by Bradshaw and Gillin?

A. No—merely a lease. I do not think we discussed—now, we might have; it might have come up. I don't think there was any consideration given to it from the standpoint of the Society or ourselves.

408 Q. Did Mr. Bradshaw or Mr. Gillin ever ask you to try to secure a purchaser for the station?

A. No.

409 Q. Or a lessee for the station?

A. No.

410 Q. So far as you know, was there any request or requirement on the part of the Society that a down payment be made as a consideration for the signing of the lease?

A. No. I mean other than the fact that the corporation had to be formed.

411 Q. Yes; that is right.

A. Yes: a corporation had to be formed to enter into a lease, and we naturally had to subscribe to stock and have a going concern.

412 Q. And pay the lease rental, the monthly rental?

A. Yes.

413 Q. But there wasn't any requirement, as I understand it, as a down payment on the lease?

A. No.

414 Q. Did you participate in securing any stockholders for the new company?

A. No.

[fol. 150] 415 Q. Do you know who determined what stockholders should come into the new company?

A. No; I do not.

416 Q. To refresh your recollection, Mr. Myers—your deposition was taken in this case about a month ago, wasn't it?

A. I think so.

417 Q. At that time, Mr. Myers, weren't you asked the question: "Do you know who determined what stockholders should come into the new company?" And didn't you answer: "Well, I think Mr. Gillin had to be satisfied on that score."?

A. Yes; that is right, but I don't know that he determined it.

418 Q. What office do you hold in the new company?

A. Vice-president.

419 Q. Are you a director?

A. Yes.

420 Q. How much did you invest in stock in the company?

A. Twenty-five thousand dollars.

421 Q. Do you know whether any other stockholders invested that much or more?

A. No; I do not. I don't know.

422 Q. What stock did you receive for your twenty-five thousand dollars?

A. Well, I received, I think it was 250 shares of preferred stock at $100.00 a share, and I think it was 250 shares—I wouldn't be sure about this—of the common stock at $1.00 a share.

423 Q. Did you have anything to do with determining the [fol. 151] classes of stock in the new company?

A. Well, only in the discussion in setting up the financial, in discussing it; I don't know that I had any more than anybody else had to do with it.

424 Q. Do you know what reason there was for dividing the stock into different classes?

A. No; I don't remember that exactly.

425 Q. Do you recall the different classes of stock?

A. Well now, I think the stock that I purchased is an "A" stock, and some of the stock, I believe, that Mr. Gillin got is a "B" stock.

426 Q. Both "A" and "B" are preferred stock?

A. Are preferred stock—that is right.

427 Q. And the balance is common stock?

A. That is right.

428 Q. To refresh your recollection, Mr. Myers, about the classes of stock, weren't you asked this question when your deposition was taken: "What was the reason, if you know, why the stock was divided into different classes?" And didn't you answer: "Well, it is a lease. We hope we may be able to pay off the preferred stock as it has a call privilege and can be retired and the common stock would control." Were you asked that question?

A. Yes.

429 Q. And is that a fact.

A. Yes.

[fol. 152] 430 Q. Were you acquainted with any of the other men, the stockholders in the new company, Mr. Myers?

A. Well, yes; I knew some of them.

431 Q. Which ones?

A. I knew Mr. Matthews and Mr. Meyers, Mike Meyers.

432 Q. How long have you known Mr. Matthews?

A. Oh, around six or seven years or so.

433 Q. What has been the nature of your acquaintance with Mr. Matthews?

A. Well, he was an attroney for the Loup District in some of their cases, and I met him in that way.

434 Q. Mr. Matthews has also done some work for the Consumer, hasn't he?

A. That is right; yes.

435 Q. And now represents the Consumers in their effort to acquire the facilities of the Nebraska Power Company?

A. Well, I don't know that he is now; he was, but I don't know that he is right now.

436 Q. How long ago is it that you knew he was representing them?

A. Well, during the last year up until Fall some time.

437 Q. Did you have discussions with him as late as last Fall concerning the Consumers acquiring the Nebraska Power Company facilities?

A. Yes; that is right.

438 Q. And so far as you know he is still representing them?

A. So far as I know, yes.

439 Q. How long have you know Mr. M. M. Myers?

[fol. 153] A. Oh, I met him at Columbus, that was in 1938 or 1939, along about there.

440 Q. What has been the nature of your acquaintance with Mr. M. M. Meyers?

A. Well, he represented some eastern bankers in buying —rather selling some of the bonds of the Consumers.

441 Q. That is, when the Consumers takes over power facilities, it issues bonds on those facilities and sells the bonds?

A. To the bankers, and he represents one of the banking groups that are disposing of the bonds.

442 Q. Are you still interested in the Consumers acquiring these Omaha power facilities?

A. Yes.

443 Q. Would you consider the use of Radio Station WOW to sponsor or promote that sale, a proper use of the station?

A. Well, it is a means of communication and publication. I should think that it could be used.

Mr. Massey: I do not believe you understand: he wants to know whether it is proper—not advisable but whether it is proper.

444 Q. (Repeated by reporter)

A. You mean WOW to promote the sale?

445 Q. Yes.

A. No; no, I would not; that is an entirely separate organization for making money out of the Radio business; they have nothing to do with the Consumers Power or the Nebraska Power, not a thing. If the Nebraska Power wanted [fol. 154] to get some time on the radio they could do it, and the Consumers could do it, but they couldn't do it under the law because they couldn't spend the money to do it.

446 Q. I may have asked you this question: this firm of lawyers in New York City, Breed, Abbott and Morgan, that you and Mr. Gillin consulted concerning the lease of the radio station, have they represented you in connection with the Consumers acquiring the Nebraska Power Company facilities?

A. No; no, they don't; no—nothing in connection there—they don't handle municipal law. I may have discussed various things with them but not that.

447 Q. Have they ever represented you in connection with this Omaha deal?

A. They are my lawyers, and I use them, and I maybe in conversation discussed this Omaha situation with them as I have others, but I don't know that they have done any special work on it at all.

448 Q. To refresh your recollection, Mr. Myers, when your deposition was taken in this case were not you asked this question: "Who now represents you as attorney in connection with this Omaha deal?" and you answered: "Well, nobody; nobody now." and were not you asked the question: "Who has represented you as attorney in connection with that deal?" And you answered: "Well, I have used several different lawyers, one not any more particularly than the other—Breed, Abbott and Morgan." [fol. 155] Were not those questions asked you and didn't you answer them as I have read?

A. Yes, and in clarifying that, in answering your question now as to whether they have done any direct, specific work on this, I would say now I may have discussed it with them for if it came to a deal I would use Breed, Abbott and Morgan for my side.

449 Q. Is this right: that Breed, Abbott and Morgan of New York City have represented you in some of your personal matters, they have also represented the Consumers or represented you in connection with the Consumers deal here in Omaha, and they also represented the company in connection with the preparation of the lease on Radio Station WOW?

A. No.

450 Q. Have I got that right?

A. You are taking in a little too much territory, I think.

451 Q. (By Mr. Crossman) Point out where it is too much, Mr. Myers.

A. Well, Breed, Abbott and Morgan, in connection with—well, for instance, if we buy a corporation—when we come to buying a corporation there are corporation lawyers; sometimes we use Breed, Abbott and Morgan, Cravath de Gersdorff, Swaine and Wood, Zachry, Parlin and so forth, quite a lot of them; maybe some particular phase of corporation law I might discuss with them in the dissolving

of that corporation. You see, we buy the stock; now, you understand then we dissolve these corporations; well, in [fol. 156] connection with that, we have to have some advice on the corporate state, but that does not come until we are ready to buy the property, so, so far as Omaha was concerned, we would not have discussed any of that with them until it comes time to buy the property, if we do. Now, if we haven't used Breed, Abbott and Morgan in the bidding in of the other properties, we haven't except as a matter of discussion, not that they were the only ones to do it—we have other lawyers too; when you want to do these things you just don't have one set of lawyers; you have several.

452 Q. Is this right, Mr. Myers: that Breed, Abbott and Morgan is one of the firms of attorneys with whom you have discussed questions arising in connection with the acquisition by the Consumers of the Nebraska Power Company here?

A. Yes—nothing specific—you see it is a little different than my hiring them now for the Nebraska Power deal.

453 Q. Well, if you continued in this deal here to a sale, you would expect to use that firm?

A. Yes; I expect to use them as one of several firms.

454 Q. And that is the same firm that you and Mr. Gillin used in discussing the leasing of Radio Station WOW?

A. Discussing some of the terms in the lease, yes. It had more to do with the tax angle than anything else, if I remember the discussion. John would know.

Mr. Stewart: I think that is all.

[fol. 157] Cross-examination.

By Mr. Crossman:

455 Q. Mr. Myers, preliminary to a question that I am about to ask you, I want to read you an allegation from the plaintiff's petition so you will get the background about this case—(interrupted).

Mr. Stewart: To which the plaintiff objects as improper, and immaterial, and not cross examination.

Mr. Crossman: You haven't even heard the question.

Mr. Stewart: Well, I did not ask him about what was in the petition.

The Court: If it is a question of something in the petition with reference to the subject——

Mr. Crossman: Precisely.

456 Q. (continued) Mr. Myers, in paragraph nine of the petition Dr. Johnson charges this—including you—it is said: Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants—and I will go back and name them—in violation of their duties as officers of the Society and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of Radio Station WOW for a grossly inadequate consideration. Now, after your deposition and the deposition of all the other stockholders of Radio Station WOW Inc. was taken, Mr. Stewart amended this allegation so it reads now as follows: "Shortly prior [fol. 158] to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants, in violation of their duties as officers of the Society and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves and their friends and associates the possession and control of Radio Station WOW for a grossly inadequate consideration." Now, further, preliminary to my question, let me say that the individual defendants referred to there are the following: De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Stanley C. Holston.

Mr. Wells: The name is Sterling C. Holston.

457 Q. (continued) Sterling C. Holston. Now, my question—do you know Sterling C. Holston?

A. I don't think I ever met him. I don't know him unless I have met him over there sometime. I have met several people here.

458 Q. So far as your recollection is concerned, have you ever met Sterling C. Holston?

A. No.

459 Q. So far as your recollection is concerned have you ever met R. E. Miller?

A. No.

460 Q. Have you met W. C. Braden?

A. Yes.

461 Q. Have you met William Ruess?

[fol. 159] A. Yes.

462 Q. And Mr. Newberry?

A. Yes.

463 Q. And Mr. Patterson?

A. Yes.

464 Q. And Mr. Bradshaw?

A. Yes.

465 Q. Now, you are a stockholder in Radio Station WOW, Inc., which is one of the defendants in this case, as you previously have testified?

A. Yes.

466 Q. Who, if anybody, put up any part of the $25,000 that you invested in that corporation, other than yourself?

A. Nobody.

467 Q. Who, if anybody, either guaranteed or agreed to reimburse you or in anyway whatsoever assist you in either procuring or putting up that money?

A. Nobody.

468 Q. Now, what arrangement had you with Mr. Bradshaw as to how and when he is going to acquire your stock?

A. None whatever.

469 Q. Directly or indirectly?

A. In no way whatever.

470 Q. Openly or secretly?

A. Not in anyway.

471 Q. Has there ever been even any discussion of such a thing?

[fol. 160] A. Never of any kind.

472 Q. What arrangement have you, Mr. Myers, or have you any arrangement with him, either in his behalf or for anybody else that the stock can be acquired, or any income from it is to be paid to him or in his behalf?

A. No; none at all.

473 Q. Now, what arrangement have you had with Colonel Patterson, one of the defendants as to when or how or for what consideration he is going to acquire your stock?

A. No arrangement of any kind.

474 Q. Or any interest therein?

A. No.

475 Q. Has there ever been any such discussion?

A. No.

476 Q. With him?

A. No, sir.

477 Q. Or with anybody else?

A. No, sir.

478 Q. Now, what is the arrangement you have with Mr. Newberry as to the nature of the arrangement by which he is going to acquire your stock?

A. None at all.

479 Q. Or any interest therein?

A. None at all.

480 Q. Have you ever had any such discussion with him?

A. No; never did. I own that stock and want the investment.

[fol. 161] 481 Q. And what is your arrangement with Mr. William Ruess as to the arrangement by which he is going to acquire your stock?

A. None at all.

482 Q. Or any interest in it?

A. None at all.

483 Q. Has it ever been discussed with him?

A. No.

484 Q. What is your arrangement with Mr. W. C. Braden, by which he is going to acquire your stock?

A. No arrangement of any kind.

485 Q. What is your arrangement with Mr. R. E. Miller by which he is going to acquire your stock?

A. None at all.

486 Q. Or any interest therein?

A. None at all.

487 Q. Have you ever had any such discussion with him?

A. No.

488 Q. What is your arrangement with Sterling C. Holston by which he is going to acquire your stock?

A. None at all.

489 Q. Or any interest in it?

A. None.

490 Q. Have you ever had any such discussion with him?

A. No.

491 Q. Now, Mr. Myers, you have heard the conclusion I read you from the petition: have you ever discussed with [fol. 162] any living person any arrangement or any consideration under which anybody is ever to acquire your stock or any interest therein of any nature whatsoever?

A. Yes, my wife and daughter; that is about all.

492 Q. All right—I got it too broad there, did I?

A. Yes.

493 Q. Well, who else have you discussed it with?

A. Nobody.

494 Q. Your wife and daughter?

A. That is all.

495 Q. And that is a matter of your family property disposition and holding?

A. That is right.

496 Q. Well, does anybody have any interest directly or indirectly, openly or secretly or any other way, in your stock except a contingent interest of your wife and daughter?

A. That is all.

Mr. Crossman: Now, I come to some questions which I want to inquire about subject to my objection to the direct examination on the same question.

497 Q. You testified upon direct examination, Mr. Myers, that in the event the Consumers offer to the American Light and Power or to the Nebraska Power should be accepted, on the basis of your contract your compensation would be, in round figures, $500,000?

A. Yes; around that, yes.

[fol. 163] 498 Q. Now, is that gross or net?

A. Oh, that is gross.

499 Q. Now, when you come down to the net, what are the factors that must be taken into consideration to arrive at the net figure in the event that deal should ever go through?

Mr. Stewart: Objected to as immaterial, not tending to prove or disprove any issue in this case, and not the best evidence.

The Court: Overruled.

Mr. Crossman: You may answer, Mr. Myers. What are the general classifications of expense that must come out?

A. Well, there is all of my office expense and rents and so forth, my traveling expenses—those, and attorneys, lawyers, engineers, accountants—well, there are a good many expenses to do a job like this that make the *the* net look a lot less than the gross—by a great deal.

500 Q. Now, that is what I thought. Have you ever made an estimate—and I am inquiring about the direct examination on your relationship as fiscal agent for the Consumers

and its predecessors—as to what about your average net has been for the years since you have been fiscal agent?

Mr. Stewart: That is objected to as incompetent, irrelevant and immaterial, calling for estimate, not cross-examination and not the best evidence.

The Court: You may answer.

A. Well, if I took the time that I started here in Nebraska [fol. 164] until now, it would be about $25,000 a year.

501 Q. Net to you?

A. That is right.

502 Q. For the years you have been acting in these matters?

A. That is right.

503 Q. (By the Court) Those haven't been as large as this proposition—the propositions you have handled are not as large as this one would be?

A. No.

504 Q. But in the aggregate they are, or were?

A. Yes; you see the total amount is someplace around forty-five to forty-seven million, and this would be around oh, forty-two to forty-three million.

505 Q. That is, the aggregate in the matters you handled previously would somewhere approach the Nebraska Power?

A. You are talking about Nebraska now?

506 Q. Yes.

A. Yes.

507 Q. That would be a fair statement?

A. Yes; that is right. However, in order to clarify that a little bit, I believe I would make more on this, that is, if I worked on this a year when I get through. If you average that out it wouldn't be so much. I am glad to clarify this and give it to the public—I have to do it anyhow—it costs me in payment of these fees, attorneys and so forth, about 70 per cent of my gross. Now, I have to pay out of the 30 per cent my personal expenses such as, [fol. 165] you know, office expense, travel, personal expense and so on, so when I get through I don't have any too much.

508 Q. Well, is it true the expenses which you advance are in the last analysis contingent upon a deal?

A. Oh, yes.

509 Q. So, if there is no deal you lose?

A. I lose.

510 Q. If there is a deal you have perhaps a net 30 per cent?

A. Not a net 30; it would be a gross 30 to me, less my personal expenses. You see I hire these other things done and then I have my own expenses.

511 Q. Now, at the time you became a stockholder in Radio Station WOW, Inc. one of the defendants here, what was said by you to Mr. Bradshaw or any member of the Woodmen Society or your associates, with reference to you acquiring an interest in Radio Station WOW, Inc., to promote the Consumers Power purchase of the Nebraska Power Company? Was that discussed?

A. No; it had no part in my interest in WOW at all. Now, of course, there were a lot of accusations made by those opposed to this type of work, and we joked about it, I would say, afterwards, but it had no part in that deal. I wouldn't say we discussed it in any way.

512 Q. Well, Mr. Myers, it is more serious than that; the accusation is expressly made in this lawsuit, now, what is the fact about it?

[fol. 166] A. Well, the fact is it never was true. There certainly isn't any foundation for it at all. I wouldn't buy the station to promote the sale of Nebraska Power to Consumer when I suppose for a lot less money I could have taken some time on the station, if that was my job, which it isn't, and explain to the public here—they have never had the story yet—the proposition we have for them, which we believe is the one for them, but I have never done that, and the Consumers couldn't, so there you are.

513 Q. You have how many associates in Radio Station WOW Inc., the corporation?

A. Well, ——

514 Q. Will you name a few of them? Harvey Milliken is a stockholder, isn't he?

A. That is right.

515 Q. Now, do you know whether or not he is for the sale of the Nebraska Power to the Consumers Power District?

A. Well, since this lawsuit has started we have discussed it among most all the stockholders, and if I remember correctly, I would say he is against it.

516 Q. Now, let us take another one, J. J. Isaacson is one

of your associates in the corporation—is he one of your associates in the corporation?

A. Yes.

517 Q. Do you know what his standing is on whether or not the Consumers should acquire the Nebraska Power? Do you know?

[fol. 167] Mr. Stewart: Objected to as not proper cross-examination, calling for a conclusion of the witness and incompetent. I asked him nothing on that subject.

Mr. Crossman: You charge that he is a stooge, one of them, for Mr. Bradshaw and the others, in your petition.

Mr. Stewart: Well, I didn't charge he was a stooge, and furthermore, the cross-examination of the witness is not governed by what is in the petition but what the witness is asked on direct examination; cross-examination can't go into any other field.

The Court: This is the same field gone into.

Mr. Stewart: I didn't go into this subject in any way.

The Court: You may answer.

A. Well, I have heard him say he is against it. I don't think he knows anything about it, however, but he says he is against it.

518 Q. Well now, another one of your fellow conspirators, Mr. Myers, is Robert P. Samardick: is that right?

A. Yes.

519 Q. Have you heard him say where he stands on the sale of the Nebraska Power to the Consumers District?

A. No, I don't——(interrupted).

Mr. Stewart: Objected to as hearsay.

A. (continued) I don't think I discussed it with him.

520 Q. You don't know about him?

A. I don't know.

521 Q. Now, one of your associates is John Gillin: is that right?

[fol. 168] A. That is right.

522 Q. Is he a fellow stockholder?

A. That is right.

523 Q. Has he said in your presence so that you know whether or not he is in favor of the sale of the Nebraska Power to the Consumers District?

Mr. Stewart: Objected to as hearsay, and not proper cross-examination.

The Court: You may answer.

A. I will tell you, I don't think he is in favor of it; I don't know that he said directly that he was not in favor of it; we never discussed it to that point.

524 Q. Very well—so that you don't know then?

A. I don't know.

525 Q. Let us put it that way. That is covered enough. Now, who is Thomas J. Wallace, if you know, one of the stockholders?

A. He is from Chicago.

526 Q. How long have you known him?

A. Well, about the day I guess we signed up the papers is the first time I met him.

527 Q. The first time in your life, you met him?

A. Yes; I never knew the man before.

528 Q. Did you suggest that he become a stockholder?

A. No; I never knew the man.

529 Q. Do you know what his attitude is by what he has told you?

[fol. 169] A. No; we never discussed it.

530 Q. You never have discussed it?

A. No.

531 Q. Do you know M. M. Myers?

A. Yes.

532 Q. Is he one of your associates?

A. Yes.

533 Q. You mentioned him before: what is his investment or banking house?

A. Well, M. M. Myers has his own office here, but he has connection with Stranahan Harris Company of Toledo.

534 Q. The Stranahan Harris Company?

A. Yes.

535 Q. Did you ever discuss his attitude in that connection?

A. Yes.

536 Q. Well, let us find out what it is.

A. He is in the banking business; he sells bonds; whether the Consumers buys it or not, I don't know that it makes much difference to him so long as he gets the bonds to sell. I think he believes that the Power Company should be transferred to the hands of the people to make the savings that we know exist, but I don't know that he has ever committed himself that the Consumers are the only ones to buy it, by any means.

537 Q. Do you know what the attitude of your associates Francis P. Matthews is on this question?

[fol. 170] A. Yes; I have discussed it with him.

538 Q. What does he say?

A. Well, Mr. Matthews has given this a lot of study, and he knows something about the utility business, being a member of the MUD Board here, and after learning what we could do under the law and from an operating standpoint, I am sure he has come to the conclusion, taking all things into consideration, that the Consumers would be the logical people to buy the Nebraska Power and then make the proper kind of arrangement with the city to operate it. That is the way I remember it.

539 Q. May I ask you this, Mr. Myers, do you know as one of the stockholders of Radio Station WOW Inc., if in any contraversial matter time is given to one side, as a matter of law the same time has to be accorded to the other side: do you know that?

A. Well, yes; I think I do; I think you have to.

540 Q. Not as a matter of wish but as a matter of law?

A. Yes, as I understand it, you have to give both sides——(interrupted).

541 Q. The same opportunity?

A. The same opportunity, yes.

542 Q. At the same consideration?

A. That is right. Wouldn't that be on any contraversial or political?

543 Q. That is correct, Mr. Myers; that is correct.

A. Yes.

544 Q. Now, you made a statement upon direct examination that perhaps it would be helpful if you could expand [fol. 171] some: you said, in substance that the Consumers —in substance, now—could not provide funds for a promotional campaign over a radio station: did you make a statement, in substance, of that kind? Did you make such a statement in general substance?

A. If we are talking now about buying the Nebraska Power Company——(interrupted).

545 Q. You talk about that.

A. Then, I say yes.

546 Q. I will talk about that, because that is the specific thing here: you are getting this station for the purpose to promote a campaign so that the Nebraska Power can be

acquired by the Consumers; that is the charge in this petition.

A. I see.

547 Q. Specifically.

A. I see.

548 Q. Now, what are the reasons, so far as you know, why the Consumers could not provide funds we will say for radio promotion in this manner: what are those reasons?

A. Well, they would not have any money in the first place.

549 Q. Well, is it a matter of lack of funds?

A. It is a matter of lack of funds. You see, to give you that a little clearer the Consumers District under the law has no right to spend any of its money from the operation of any of the divisions they now operate to buy or purchase or in any way help any other division that they might operate, and they can't even themselves loan money from one [fol. 172] division to another. In order to clarify that a little bit, the Consumers buys one property and puts it into, we will say, the Northeast Division of which there is one. Now, no money from that Northeast Division could be used to buy the Nebraska Power Company or buy radio time or any other expense because it would have to take it from the Northeast Division District funds which the law prohibits them from doing. This company has seven or eight divisions and no fund can be loaned from one to the other, or mix them up. They couldn't get the funds.

550 Q. Well, take the Northeast Division now: what was one of the companies acquired that went into the Northeast Division?

A. Yes—the Interstate Power Company, I think it was.

551 Q. Now, when the property was acquired there was a bond issue put upon the property?

A. That is right.

552 Q. And in that indenture which secured that bond issue, were there restrictive provisions as to the disbursement of the fund?

A. Yes, there are.

By the Court:

553 Q. You could spend some of that money, couldn't you?

A. Yes.

By the Court:

554 Q. You could take it out of the $500,000 you get?
A. Yes; I could if I get it.

555 Mr. Crossman: Does your Honor want to rule on the [fol. 173] other question?

The Court: No. I think he answers the question, if he wants to spend any of his money, he can. I think the law is they have to give both sides the same chance, but if he wants to spend any money he can take it out of the $500,000 he gets, but I don't think it is material.

Mr. Crossman: That is all.

556 Mr. Massey: Mr. Myers, preliminary to a few questions I will ask, I will call your attention to paragraph 13 of plaintiff's petition:

> "Defendant officers of the Society did not, prior to the execution of the aforesaid lease, disclose to the Society's members the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single asset of the Society for a grossly inadequate consideration and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to the Consumers' Public Power District as aforesaid."

By Mr. Massey:

557 Q. To your knowledge who does dominate and control Radio Station WOW Inc.?

Mr. Stewart: That is objected to as calling for a conclusion and not cross-examination.

[fol. 174] The Court: Well, that question assumes that somebody does control it.

Mr. Massey: That is my question: who, to his knowledge, does control it.

The Court: Well, he may not know; you have to show that he knows.

558 Q. Well, do you know who controls Radio Station WOW Inc.?

A. The Board of Directors—the stockholders.

559 Q. Are any of the men constituting the stockholders or the directors or the officers of Radio Station WOW Inc.,

to your knowledge, related to any of the directors of the Woodmen of the World Life Insurance Society?

A. Not to my knowledge.

560 Q. Are you?

A. No.

561 Q. Is there any arrangement of any character whereby their friends or relatives shall participate in any way in the management or operation of Radio Station WOW?

Mr. Stewart: Objected to as calling for a conclusion, no sufficient foundation laid.

The Court: You may answer.

Mr. Massey: I am asking to his knowledge.

The Court: You may answer.

A. No; there isn't.

562 Q. Has any officer or director of the Woodmen of the World Life Insurance Society ever suggested such a thing to you?

A. No.

[fol. 175] 563 Q. Mr. Myers, did the fact that you are interested in, let me say, putting over this deal here whereby Consumers will acquire Nebraska Power, motivate you in any manner in becoming a stockholder in Radio Station WOW?

A. None at all.

564 Q. Is there now any connection or is there to be any connection in the future between Consumers Public Power Company and Radio Station WOW, Inc?

The Court: So far as you know.

Mr. Massey: If you know.

A. No; I don't know.

565 Q. Is a part of the time of the station to be used to promote the sale of those power facilities here to the Consumers?

A. Not that I know of.

566 Q. Do you know where the majority of the stock of Radio Station WOW is? By that I mean is the majority of the stock of Radio Station WOW owned locally or by non-residents of the State of Nebraska?

A. The majority of the stock would be owned locally.

Mr. Massey: That is all.

Mr. Crossman: May I have one further question, please?

By Mr. Crossman:

567 Q. Obviously, Mr Myers, if you were going to spend your own money for radio promotion, you could have done it with WOW without acquiring the station, couldn't you?

A. I could, yes, obviously.

568 Q. Or with KOWH or with KOIL or with KBON?

[fol. 176] A. Yes.

Redirect examination.

By Mr. Stewart:

569 Q. That is assuming those stations would rent you that time?

A. Yes, and also that the WOW would.

570 Q. Now, Mr. Massey has asked you about paragraph 13 in the petition in which it is alleged that the officers prior to the execution of the lease did not disclose to the members of the Society the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single asset of the Society for a grossly inadequate consideration and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha Power facilities to the Consumers Public Power District: now, you are interested, as I understand it, in the sale of the Omaha Power facilities to the Conusmers Public Power District?

A. That is right.

571 Q. And you are the largest investor in the stock of the new company that operates the Radio Station, aren't you?

A. I don't know that I am, really; I don't know that I am, no.

572 Q. Well, it is admitted as a matter of record in the pleadings here that John Gillin has invested about $10,500 in stock and some of the others $10,000 and some $5,000 and you are the only one to invest—well, I believe you said you invested $25,000?

[fol. 177] A. Yes; that is right.

573 Q. Why did you purchase that stock, Mr. Myers?

A. Well, I thought it would be a good investment; I thought the future of radio was good, and that the position of this radio station was favorable, and that I might make a fairly good return from it over a period of years.

574 Q. Well now, what did you base that on? You didn't know anything about the radio industry: was that from what somebody else told you?

A. Well, I wouldn't say I didn't know anything about it, I thought I knew enough about it through my experience and reading and knowledge of the radio business, that this station would be a good location, and knowing what the station already had done, why, I thought that the future would be very good for it.

575 Q. Did Gillin ever tell you that, that he thought the future of the station was good?

A. Oh yes.

576 Q. And Bradshaw?

A. I don't know that we discussed that with Mr. Bradshaw, about the future.

577 Q. Mr. Myers, you said that you knew Mr. Braden, Ruess, Newberry and Patterson: what has been the nature of your acquaintance with those men?

A. Well, I met them, oh, I went to lunch with them once; I think Mr. Bradshaw took me to lunch to meet them sometime ago, and I have discussed with them, met them on the street here in Omaha since I have been here more or less, [fol. 178] just generally,—I don't know—talked some business and some just pleasantries.

578 Q. Well, would you say they were business friends or social friends?

A. No; I would say business acquaintances.

579 Q. And have you seen them outside of Omaha at any time?

A. No.

580 Q. Are your relations with them friendly or unfriendly?

A. Well, they have been friendly as far as I know.

581 Q. Now, Mr. Crossman asked you if you had any arrangement with Mr. Bradshaw or any of the officers of the Society to share with them in any way the benefits of your stock in the new company: if any arrangement existed, would you consider it a proper and honorable arrangement to make?

Mr. Crossman: That is objected to as purely hypothetical; the question is would he consider an arrangement which he hasn't, a proper arrangement.

Mr. Stewart: The point is that the transaction Mr. Cross-

man inquired into was not one that a witness would disclose in any event. I thought I would ask Mr. Myers his views on it.

Mr. Crossman: You are the one that made the charge; we are merely meeting the bed you brought us to here.

The Court: You would have to set forth what the arrangements were—what kind of an arrangement?

582 Q. The arrangement Mr. Crossman asked you about whereby you would share the benefits of your stock with [fol. 179] any of the officers or directors of the Society?

Mr. Crossman: That is objected to as incompetent because it is speculative and hypothetical in a field where no hypothetical question can be of any value: the question is, is an honest deal honest or a dishonest deal dishonest.

The Court: What he is trying to get at is if he made any arrangement with any of the officers of the Society to share any part of his profits, would he think such an arrangement proper.

Mr. Crossman: I withdraw the objection.

A. Well, whatever arrangement I would have with any officer of any corporation, I would have to know that the officers and directors and stockholders and so forth did approve any arrangement we might have; it would have to be an open arrangement which, of course, a lot of lawyers would have to pass upon it, so I imagine we would have enough lawyers to make it a fair deal and so forth, one that was ethical, right and decent.

583 Q. And if it was not that kind of a deal, you would think it was not the right kind of a deal?

A. That is right; and I wouldn't go into it.

584 Q. In answer to one of Mr. Crossman's questions you said you thought your own income from your Nebraska deals would not amount to over $25,000 a year up to the present time?

A. That is right.

585 Q. And how many years do you include?

[fol. 180] A. 1935—I guess I start in 1935, or 1934; the first time was in August of 1934, that I spent any time in Nebraska, August 1934 up to the first of 1943. It was along about, I think when I made that estimate, it was along about, someplace along in October, September or October, and I haven't had anything since so it would be about right.

586 Q. So that would be approximately $225,000 net in your dealings up to the present time?

A. No, it would not be that much, would it? It would be about five times—let's see—that is the last of 1934 now, remember, that I started to work; it was in August of 1934; that is pretty close to 1935; well, take all of 1935, 1936, 1937, 1938, 1939, 1940, 1941 and 1942—make that eight years, about; that was about $220,000.

587 Q. And in this Omaha deal, as I understand it, your expenses—you have to pay the expenses?

A. That is right.

588 Q. And those expenses in past transactions have run up to 70 percent of your compensation?

A. About that.

589 Q. And so, in the Omaha deal, if you don't succeed in your efforts to acquire these facilities for the Consumers you will have to stand that expense personally?

A. That is right.

590 Q. When your deposition was taken before, didn't you state that the use of Radio Station WOW to sponsor [fol. 181] or promote the sale was a proper use of the station?

Mr. Crossman: I object to that as an improper form of question; if there is an attempt at impeachment, I request the court to suggest to counsel to ask the proper question: were you asked this question and did you make this answer.

Mr. Stewart: I will do it.

591 Q. Mr. Myers, when your deposition was taken before, were not you asked this question: "Would you consider the use of Radio Station WOW to sponsor or promote that sale"—referring to power facilities here in Omaha—"a proper use of the station?" and did you not answer: "Well, it is a medium of publicity; I imagine it would be a good use for it if somebody wanted to pay for it."

A. Yes.

592 Q. And that is a fact?

A. Yes.

Mr. Crossman: Well, what does that impeach now?

Mr. Stewart: Well, I am not arguing with you.

593 Q. You said that Mr. M. M. Meyers, if the Consumers

acquires the Omaha Power facilities, would participate in the sale of those bonds?

A. That is right.

The Court: I understand it might; whether it would afford an opportunity it is like any other property.

594 Q. Well, with reference to the Consumers acquiring [fol. 182] the property, not the city, but if the Consumers acquire the Nebraska Power Company facilities, then, as I understand it, Mr. M. M. Meyers would participate in the sale of those bonds for the banking syndicate?

A. I don't know definitely that he would; I would think he had a good chance to do it. I wouldn't know until the bonds were issued.

595 Q. He has on the past transactions?

A. I am not sure but I think he has on all.

596 Q. If the bonds were not issued, Mr. Meyers would not sell any bonds, Mr. M. M. Meyers?

A. That is right.

Mr. Massey: I would like to ask one question as long as Mr. Stewart has opened up the moral question.

By Mr. Massey:

597 Q. Mr. Myers, would you consider it honorable to be a party to a plan whereby the officers of the Woodmen of the World Life Insurance Society could secretly obtain possession of this Radio Station to their own benefit and to the detriment of the policyholders?

A. No.

Mr. Massey: That is all.

(Witness excused.)

(Thereupon an adjournment was taken until 2 P. M. of the same day March 2, 1943.)

[fol. 183] 2 P. M. March 2, 1943.

Court convened pursuant to recess, same parties present as before, and the following proceedings were had:

WILLIAM RUESS recalled for cross-examination, testified as follows:

By Mr. Crossman:

598 Q. Mr. Ruess, when was the possession of the WOW Radio Station turned over by the Society to the new corporation?

A. On January 14 of this year.

599 Q In your testimony this morning you described somewhat in detail your duties as the supervisor: were those duties that you performed up until the time that the station was turned over on January 14th?

A. That is right.

600 Q. And have you performed any of those duties since that date?

A. None whatever.

601 Q. And who, if you know, has generally supervised and managed the station since that time?

A. I don't know; I presume the proper officers of the new corporation.

602 Q. But not you?

A. Not me.

603 Q. Has there been any supervision of any management of any kind or character whatsoever since January 14th by any officer or director on the part of the Society?

A. Not that I know of.

604 Q. In connection with your supervision of the Radio [fol. 184] Station prior to January 14th, with whom would it become your duty to confer from time to time—with whom of the other officers or directors of the Society did you discuss the affairs of the station?

A. Well, all of the officers discussed the station from day to day.

605 Q. Did you have some discussions with Mr. Bradshaw about it from day to day?

A. Yes.

606 Q. Now, generally what type of things or kind of things did you bring up for discussion with Mr. Bradshaw?

A. Chiefly when it was—that is to say, to consult him on

many things, it would be matters of policy and things that involved more than the ordinary operation of the station.

607 Q. Would it be fair to say something out of routine in management?

A. That is it.

608 Q. Something involving major policies and major decisions?

A. That is right.

609 Q. Now, did you have discussions from time to time with Mr. Patterson?

A. Yes.

610 Q. And would they be frequent?

A. Quite frequent.

611 Q. What type or character of things would you be discussing with Mr. Patterson?

A. Anything that was out of the ordinary and he was [fol. 185] available, and things I thought he might have been familiar with were discussed.

612 Q. Out of the past experience with the station?

A. Yes.

613 Q. Now then, you mentioned this morning you had frequent discussions with Mr. Wells?

A. Yes.

614 Q. That is Mr. Rainey T. Wells, sitting here in the court room?

A. Yes.

615 Q. The general counsel for the Woodmen of the World Society?

A. Yes.

616 Q. And any matters involving legal matters or legal consultation, did you take that up with Mr. Wells?

A. Invariably.

617 Q. Would that be a frequent occurrence?

A. Quite frequent.

618 Q. Would you say from day to day?

A. Well, in the last year or more it kept increasing.

619 Q. Why was that, by reason of what?

A. Oh, by reason of things that were taking place in the radio world, the changes in the Federal Communications Commission, and certain rules, various contracts, various departments that were being met with by various interests.

620 Q. And that was in connection largely with the Federal Communications Commission?

A. Well, that and the American Federation of Music.

[fol. 186] 621 Q. How about ASCAP?

A. And ASCAP.

622 Q. What was ASCAP, Mr. Ruess?

A. American Society Composers and Publishers.

623 Q. How did that affect the radio station?

A. Well, we had to pay them a percentage of gross receipts.

624 Q. For what?

A. For the use of music that they controlled.

625 Q. Now, was that a continuing problem for sometime?

A. That had been for years.

626 Q. Over a period of years?

A. Yes.

627 Q. And was that one of the matters that was brought to the attention of your general counsel and your president and vice-president?

A. Yes.

628 Q. You referred to this matter of the new rules of the Federal Communications Commission: briefly what was that?

A. They set up a new set of regulations making requirements of radio stations in the operation of regular broadcast stations.

629 Q. Now, did those new regulations affect WOW?

A. It did; it affected all of them.

630 Q. And your station?

A. Yes, sir.

631 Q. And were there matters from time to time that as supervisor you took up with Mr. Bradshaw, Mr. Patterson, [fol. 187] Mr. Wells and others of the Board?

A. Yes.

632 Q. Were there any questions of interference with your wave length by other stations that were seeking to procure your wave length, or in litigation concerning that?

A. We were involved in that all the time I have been connected with the station.

633 Q. Well, explain to Judge Rine the significance of the wave length which you have, and why you should be involved with other stations in reference to it?

A. My recollection is originally, or sometime during the time that the government had appointed a commission to handle radio matters, there were certain rules set up which were amended from time to time and under which the frequency of 590 kilocycles was considered a regional frequency

and the requirements of the regulations were that there should be not more than three stations on that frequency, with a separation of, I think it was something like 1100 miles. The first, after the time that I took charge or had any activity with the radio station, there was a station WKZO at Kalamazoo, Michigan, that somehow had got on our frequency, and the separation or the distance from our station was much less than that indicated in the Commission's rules, so we protested the operation of that station, and that thing has gone along for all these years, and probably by now it may have been settled; there have been some compromises which is the result of engineering service [fol. 188] and so on, and by the installation of directional antenna in order that they might not affect the reception, they were allowed to operate night times; previously they had operated day times. Then every year there would be somebody make application for license on our frequency.

634 Q. Now, were those typical of things taken up by you from day to day with the officers and directors of the Society?

A. Yes, as to what our action should be.

635 Q. Now, the point has been made, Mr. Ruess, as to the percentage or ratio of time that any officer or director gave to the radio station: what is the fact as to whether or not these emergency matters, when they did come through, required attention at the time?

A. Yes.

636 Q. What is the fact about it?

A. There is no way to determine just how much. The fact of the matter is, I presume, every one of the officers had the radio station on their mind just like they would any other phase of the business; it was all our business, and it was of interest to all of us to give it thought and such time as might be required when the occasion arose.

(Change of reporter—followed by Johnson).

[fol. 189] 637 Q. Reference was made this morning in your direct examination, Mr. Ruess, to some of the negotiations that had been had for the disposition of this station. To the best of your recollection, what was the first occasion when the matter of sale or lease came up, to your knowledge?

A. There was from time to time expressions on the part of some of the officers as to whether or not the radio station

was of sufficient value to the Society to allow it to take up the time of the officers, even in the earlier days, but the first time any concrete consideration of the thing came up was sometime after we had moved up to our present location, when the World-Herald started negotiations through Mr. Paul Martin, who was then their attorney.

638 Q. Can you fix an approximate date on that?

A. Well, that may have been 1936 or 1937. I don't recall now.

639 Q. That was Mr. Paul Martin of Omaha?

A. Yes.

640 Q. Did you have some conferences at that time with reference to those matters?

A. Well, to a certain extent, but not a great deal.

641 Q. Where were the negotiations carried on, if you know?

A. I think mostly at that time at Miami. Mr. Bradshaw was down there, and I think Mr. Paul Martin went there, and I believe Mr. Doorly was down there.

642 Q. Mr. Doorly is the owner of the World-Herald?

A. Mr. Doorly is the owner of the World-Herald.

[fol. 190] 643 Q. At that time were you called upon to make any investigation or to prepare any data in connection with a consideration of that transaction?

A. We did. I believe at the time the auditors were here in session, and the subject came up, and through Mr. Gillin, I believe, we made some inquiries as to the probable value of this station, and at that time we were getting the benefit of an increased rate per hour, and we were advised—(interrupted)

Mr. Stewart: Just a minute. I object to what you were advised as being hearsay evidence and incompetent.

Mr. Crossman: I will withdraw the question, and then I will ask him another question.

644 Q. Did you refer some matters to your own auditors in the Society?

A. We discussed the possible sale of the station at that time.

645 Q. The auditors to whom you refer are officers of the Society, who were likewise members of the Board of Directors, is that right?

A. Yes.

646 Q. Do you know what the tentative offer was by the World-Herald at that time? Do you know?

Mr. Stewart: That is just yes or no.

A. Yes.

647 Q. What was it?

Mr. Stewart: Objected to as incompetent, irrelevant, immaterial, and not cross examination. This relates to a [fol. 191] transaction five or six years ago, and not shown that the witness knows of his own knowledge.

Mr. Crossman: He says he knows. In your direct examination you went over this entire question, examined Mr. Ruess about this transaction from 1936 to date, and this is within that period.

Mr. Stewart: You are mistaken when you say I examined him concerning that transaction. I did not examine him concerning the purchase or any offer to purchase. Discussions that he had in 1936 or 1937, whenever it was, and this shows that the negotiations were in Florida between Mr. Bradshaw and Mr. Paul Martin and Mr. Doorly, and it is not shown that this witness was in Florida and participated in those negotiations.

Mr. Crossman: This witness has not been asked to testify, and will not be asked to testify, as to anything that occurred in Florida. But you did inquire of him upon direct examination of his knowledge with reference to proposed disposition of the station, from 1936 on.

The Court: You may answer.

(Question read.)

A. $300,000.

648 Q. Mr. Ruess, you don't propose to testify here as to what transpired between Mr. Bradshaw and Mr. Doorly in Miami, do you?

A. No.

649 Q. What was the next transaction that you recall, the specific transaction with reference to the disposal of [fol. 192] the radio station?

A. At that time?

650 Q. No. Following that.

A. Not that period?

651 Q. Well, let's clear that up. That sale was never made, was it?

A. It never was made, no.

652 Q. Do you personally know why it was not made?

A. Because it was an insufficient amount.

653 Q. What was the next specific transaction that came up for disposal of the station?

A. There never was any further offer until the matter was again taken up sometime in 1941.

654 Q. In that interval was there any discussion by you as a director or by you with other directors, in or out of board session, with reference to the advisability of making a disposition of this station?

A. Yes, there was discussion.

655 Q. I am not going to ask you what it was at this time, but was there a discussion about it?

A. At practically every meeting of the auditors and of the board.

656 Q. Did that continue from 1936 up to 1941?

A. Substantially so.

657 Q. What developed in 1941 with reference to a disposition of the station, as to a specific disposition?

[fol. 193] A. Well, I believe that it was at the spring meeting of the board when the resolutions were passed to make an effort to get some offers on the station.

658 Q. Do you recall of members of the Swanson family being interested in a proposal with reference to the station?

A. Yes.

By Mr. Stewart:

659 Q. Approximately when was that?

A. Well, that was subsequent to the action of the board.

660 Q. That was Mr. C. A. Swanson?

A. Mr. Gilbert Swanson and Mr. Clark Swanson.

661 Q. And Mr. Clark Swanson?

A. Yes.

662 Q. Do you know what kind of business they conduct here in Omaha?

A. Well, I understand they are in the creamery and poultry business.

663 Q. Do you know the name of that concern?

A. Jerpe Company. I don't know the full title.

664 Q. Jerpe Commission Company?

A. Jerpe Commission Company, yes.

665 Q. Now, at that time who in behalf of the Society was generally conducting negotiations?

A. Well, in the beginning Mr. Bradshaw and myself saw the Swansons at least two or three times, maybe more.

666 Q. And did you make investigations and did you look over data and did you make reports in connection with that proposal?

A. Well, we had it done.

[fol. 194] 667 Q. Under your directions?

A. Yes. I didn't do it directly myself.

668 Q. Did you report those matters from time to time to Mr. Bradshaw?

A. Well, Mr. Bradshaw knew about that. We discussed them when we met with the Swansons.

669 Q. Did Mr. Bradshaw confer with you from time to time about major matters in connection with these proposals?

A. Yes.

670 Q. And with others of the directors?

A. Yes.

671 Q. In your presence?

A. Yes.

672 Q. Well, what happened to the Swanson proposal, do you know?

A. Well, the Swanson proposal originally was on the basis of sale, and the various discussions brought out some of the disadvantages in a direct sale, and then later the lease proposal was suggested and worked on along that line.

673 Q. In the later lease matter did Mr. Bradshaw confer and advise with you about the major matters from time to time?

A. I was advised from time to time as to what was taking place.

674 Q. Back and forth, you would confer about it?

A. Yes.

675 Q. In behalf of the Society, is that right?

A. Yes.

676 Q. After the Carl Swanson, Gilbert Swanson transaction did not go through—and there will be further testi-

[fol. 195] mony about that in the case—do you know anything about Mr. Erickson becoming interested in a lease or purchase?

A. I never sat with Mr. Erickson, but I knew that he was one of those that were in the later negotiations.

677 Q. But that deal did not go through, or he did not participate?

A. No.

678 Q. Did you participate in conferences and discussions with the group who ultimately formed this radio station WOW, Inc., and who are now the lessees; did you participate in those matters?

A. Once or twice.

679 Q. Did you confer and advise with Mr. Bradshaw about various subject matters of that lease?

A. I was kept advised by him of the various tentative changes that were made in the set-up and what was being contemplated.

680 Q. And were you consulted as the supervisor of the station with reference to the practical matters?

A. Yes.

681 Q. And was Mr. Wells consulted, to your knowledge?

A. I presume so.

682 Q. You read this lease, did you not—did you read the lease before it was executed?

A. I did the morning it was signed.

683 Q. In detail?

A. I read it all through.

684 Q. And did you personally, as a director, approve its terms on behalf of the Society?

[fol. 196] A. I did.

685 Q. Did you believe as a director at the time that it was a good deal for the Society?

A. Well, from the standpoint that the thing had been gone into so thoroughly, I was satisfied that it was a good deal.

686 Q. And you believe so now?

A. I do so.

687 Q. There was testimony this morning that toward the close of the negotiations with the present group that a Mr. Smith and a Mr. Munger—Mr. Smith, the testimony showing, being the manager of KOWH, Mr. Munger, the attorney for the World-Herald—had some conferences with Mr. Bradshaw and you with reference to a proposed disposition. Were you present at that conference?

A. I was.

688 Q. Now, tell us approximately within what time of the closing of the present lease that conference was had.

A. Oh, I think that was within two weeks of the time when the sale was finally closed.

689 Q. Well, now, will you state, Mr. Ruess, in substance, and without going into great detail, generally what Mr. Munger and Mr. Smith proposed, and generally what the reply was in general terms?

A. I don't believe they made any direct proposal. They said, in substance, that they understood that the station was up for sale and they would like to make an offer. In fact, I believe they asked what the offer was. During the [fol. 197] conversation they were asked whether they were prepared to make a definite offer, and whether they had authority to do so. They said they had, and in the discussion it was brought out that they would like to make a trade; in other words, that the Society would take over their station and they would take over ours, and, of course, they would move our station down to theirs. Well, as I recall it, Mr. Bradshaw definitely said that we could not entertain that sort of a proposition.

690 Q. Was that the only kind of a proposition they made tentatively?

A. They did not make any other.

691 Q. Any other proposition?

A. No.

692 Q. This is a repetition, but I want to be sure I am clear about it: The tentative proposition they had was, "You take KOWH and give us WOW, and we will move out of the Insurance Building"?

A. That is the substance of it.

693 Q. Did any kind of a tentative proposal go beyond that point?

A. No, not to my knowledge.

Redirect examination.

By Mr. Stewart:

694 Q. Well, Mr. Ruess, isn't it a fact that Mr. Bradshaw said that with this other proposition before you, and until some definite action was taken on that, that he could not consider any other offer?

A. I don't know as it was in exactly that wording, but he [fol. 198] intimated that we had this other proposition and

he would not care to express himself until he knew more about whether the other was going through or not.

695 Q. But he did say that he wanted $800,000 cash on the barrel-head, I believe, as you expressed it?

A. Well, he said that would be the lowest figure he would consider.

696 Q. And he would not consider that until this other deal was out of the way?

A. Well——(interrupted)

697 Q. That is, unless the other deal fell through?

A. I presume that is what it w[illegible]

698 Q. Munger and Smith said that they were prepared to buy the station?

A. They said they had authority.

699 Q. Authority to buy it?

A. Yes.

700 Q. And were prepared to buy it, didn't they?

A. Well, I don't know:

701 Q. Well, to refresh your recollection, weren't you asked this question in your deposition: "Did Smith or Munger name any amount that the World-Herald would be willing to pay?" And you answered: "No, they didn't give any definite figure. They said they were prepared to buy it; or they had authority to make it."

A. Yes.

[fol. 199] 702 Q. That is right?

A. That is what they said. I don't know whether they were prepared or not.

703 Q. And then you were asked this question: "As I understand, it was left then that Bradshaw would discuss it with them again if the Society didn't close the pending deal with this other group?" And you answered: "It would depend somewhat upon what developed with the other group. At any rate, I don't know that they ever came back." Was that question asked you and did you give that answer?

A. Well, that don't seem just like it. There was so much noise here—let me see that.

704 Q. Yes; sure.

The Court: That day the carpenter was working upstairs.

A. Yes, there is something wrong in here. As I understand, it was left—I don't think I said it in that way (indicating).

705 Q. Well, isn't that the substance of it, anyway, Mr. Ruess, that future negotiations were to wait until it was determined whether the new company was going through with the lease?

A. Well, substantially so.

706 Q. Mr. Ruess, you referred to the distance that stations were supposed to be from each other, rules of the FCC. I didn't understand that. It was 1100 miles?

A. At that time. That was some years back.

707 Q. Oh, yes. What is the present distance?

[fol. 200] A. Well, I cannot answer that.

708 Q. Can you state approximately?

A. Well, from the fact that there are other stations that are not that far, I presume that rule has been amended.

709 Q. What is the area, approximately, that the station now covers?

A. I think the engineer ought to be able to answer that definitely. I think it is about 200 miles, a radius of 200 miles.

710 Q. You stated that after the negotiations some years ago with the World-Herald that no further offers were made until in 1941?

A. As near as I can recollect.

711 Q. And at that time a resolution was passed by the Board of Directors relating to a disposal of the station?

A. Yes.

712 Q. Are you sure that was in 1941, or was that in 1942?

A. Well, the record would show that. I won't definitely say just what date it was.

713 Q. Mr. Newberry, when he was on the stand yesterday, did not produce any resolution as adopted in the spring of 1941 by the Board of Directors relating to a disposal of the station. He did produce one in the spring of 1942. Is that the one you refer to?

A. That probably is.

714 Q. Who was it that first suggested a leasing of the station after the negotiations for a sale with the Swansons fell through?

[fol. 201] A. I don't know, but that came out, I believe, from the fact that a direct sale would bring up the matter of taxation, and it might not be the best method of disposition of the station.

715 Q. Was Gillin in on the negotiations with the Swansons and Erickson?

A. Yes, I believe so.

716 Q. And did the deal that was being discussed with those men contemplate Gillin as the manager of the new company?

A. I think that was the general understanding because of the fact that he had been manager of the station for so many years and was instrumental in building it up.

717 Q. And was he to be one of the stockholders in the new company?

A. Well, I presume so.

Witness excused.

718 Mr. Massey: If the Court please, one of the stockholders of Station WOW is here from Chicago, Mr. Thomas Wallace, at great business inconvenience. If it is agreeable with counsel for the plaintiff, I would like to put him on the stand at this time.

719 The Court: Is it agreeable with counsel for the plaintiff?

720 Mr. Stewart: The plaintiff agrees to that with the understanding that it is a part of the defense of the case.

[fol. 202] 721 Mr. Massey: That is correct.

722 The Court: And with the understanding that if something should develop in his testimony that they want to examine on later, he will be here.

723 Mr. Massey: Well, if something develops in his testimony that would require a long examination, perhaps going over into tomorrow, on the part of the plaintiff, he would have to stay, but if we can finish with him today, he wants to go back to Chicago.

724 The Court: If it is agreeable with counsel for the plaintiff, it is all right with me.

725 Mr. Massey: I think it is agreeable with the plaintiff.

726 Mr. Stewart: Yes. Call him.

THOMAS J. WALLACE, called as a witness on behalf of the defendants, out of order by agreement, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Massey:

727 Q. Will you please state your name and residence?

A. Thomas J. Wallace, 1235 Scott Avenue, Winnetka, Illinois.

728 Q. What is your business, Mr. Wallace?

[fol. 203] A. For the past six years, approximately, I have been vice-president in charge of radio for the Russell N. Seed Advertising Agency in Chicago.

729 Q. Will you describe briefly to the Court the nature of your duties and the things that you perform in that capacity?

A. Well, a radio advertising agency, or we have a general advertising business. My work is more related to the building of radio programs. I might mention some that we have under our jurisdiction: The Red Skelton program, in the past Uncle Walter's Dog House, Plantation Party, People Are Funny, Tommy Dorsey, Revillie Roundup. That is probably the principal radio programs. And we have presented a great deal of spot advertising as it is known in our industry.

730 Q. What do you mean by "building programs"?

A. Well, a radio program, in the old days of radio, was built by a network or a radio station and sold to the advertiser. In the development of radio advertising the job of building programs has more and more become the work of the advertising agency, and by building a program I mean engaging the talent and the orchestra, everything concerned with the program, and directing the writing of it and how it shall be performed, and so forth.

731 Q. Are you the Tom Wallace that we hear on the Revillie Roundup originating from Chicago?

A. That is right.

732 Q. How long have you known Mr. Gillin?

[fol. 204] A. I will say four or five years.

733 Q. Have you been associated with him on any of the committees of the National Society of Broadcasters or in any business matters other than the present deal under consideration?

A. No, sir, I have not.

734 Q. Do you know Mr. Gillin's general reputation in the radio industry?

A. I do.

735 Q. What is that reputation?

A. Well, Mr. Gilin is doubtless considered one of the most outstanding and highly respected man in our industry.

736 Q. Can you tell us why?

A. I think because he has always been very fair in his beliefs. I happen to know that he has—shall we say—fought for the thing that he has always considered right for the industry rather than whether it is for the benefit of himself personally or the radio station that he manages, and I am confident that anyone who has watched the growth of the industry and has been able to keep in touch with John's interest and the time and effort that he has devoted to the radio association of broadcasters as well as the National Broadcasting Companies, and their many, many problems, in time and effort that he devoted in the ASCAP fight, and in working out the problems of not only his engineers but his musicians, I am sure they cannot find anything to say but commendations for the contribution he has made to this industry.

[fol. 205] 737 Q. Do you know what his reputation is in the industry as a manager of a broadcasting station?

A. Probably the finest.

738 Q. Are you in a position to state what reputation Radio Station WOW has in the industry?

A. Well, I tell my friends with a great deal of pride that it is probably one of the six finest radio stations in the United States from the standpoint of service to the community that it serves.

739 Q. To what reason, or to whom would you attribute that standing?

A. Well, I have always given John Gillin most of the credit, myself.

740 Q. You are a stockholder, are you not, in Radio Station WOW, Inc., one of the defendants here?

A. I am.

741 Q. How many shares of stock do you own?

A. I think I have 100 shares of the $100 par value, and 100 of the $1 share. Is that right, John?

742 Mr. Gillin: 100 of preferred A, and 100 of common.
The Witness: Yes.

743 Q. Now, let's see. What did you pay per share for each class of stock; what did you pay for the preferred stock?
A. $100 for a share.
744 Q. And what did you pay for the common stock?
A. $1.00 a share.

745 The Court: Are they both preferred?
[fol. 206] Mr. Gillin: No.

746 Q. You had no B stock?
A. No B stock.
747 Q. You paid $100 for the A, and for the common you paid $1.00. Did you pay cash for that stock?
A. I did.
748 Q. Did you borrow that money from a bank, or did you have it in cash, or what?
A. I had it in a bank; gave a check for it.
749 Q. You gave your personal check?
A. That is right.
750 Q. On a bank here in Omaha or Chicago?
A. Chicago. The Upper Avenue National.
751 Q. Where are your stock certificates?
A. In my safety deposit box.
752 Q. In Chicago or Omaha?
A. Chicago.
753 Q. Mr. Wallace, have you read the petition filed by the plaintiff in this case?
A. In part only.
754 Q. I call your attention to Paragraph 9, and ask you if you have read this paragraph: "Shortly prior to September 1, 1942, the exact date being to the plaintiff unknown, the individual defendants, in violation of their duties as officers of the Society, and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit [fol. 207] and profit of themselves and associates the possession and control of Radio Station WOW for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose, the individual defendants did and caused to be done the following acts:". And then there is an allegation with reference to the passage of a resolution by the Life Insurance Society authorizing the

negotiation for a sale or lease, and (b) an allegation pertaining to the creation of Radio Station WOW, Inc. Did you read that allegation?

A. I believe I heard that quoted in court. I don't think I read that part.

755 Q. Now, you say your stock certificates are in Chicago. Bearing in mind the allegations that I have just read, do you own the stock that you purchased?

A. I do.

756 Q. Does anyone else have any interest in that stock?

A. None whatever.

757 Q. Is there any understanding or agreement, either written, oral or implied, that is presently effective or may become operative in the future on the happening of some contingency whereby anyone will acquire any interest in your stock?

A. None whatever.

758 Q. Do you know Mr. Bradshaw, the president of the Society?

A. I do.

759 Q. When did you meet him?

A. I believe on the occasion of the incorporation of our [fol. 208] Station WOW Corporation, which was October 3rd, I believe.

760 Q. Did you know him prior to that time?

A. I did not, no, sir.

761 Q. Do you know Mr. T. E. Patterson?

A. I met him on this trip to Omaha for the first time.

762 Q. On this trip back yesterday?

A. For the trial yesterday, yes, sir.

763 Q. Do you know Mr. Newberry?

A. Not until yesterday.

764 Q. And Mr. Ruess that has testified here today?

A. I met Mr. Ruess on one previous occasion when I came to Omaha with the show cooperating with WOW and their food show exposition.

765 Q. Do you know Mr. Braden?

A. No, sir, not until yesterday.

766 Q. Do you know Mr. R. E. Miller?

A. Not until yesterday.

767 Q. Do you know Mr. Sterling C. Holston?

A. If I met him yesterday, I don't remember him now.

768 Q. When did you first meet your associate Mr. Guy C. Myers?

A. October 3rd, at the incorporation meeting.

769 Q. Did you know him prior to that time?

A. I did not.

770 Q. When did you first meet Mr. Mike Meyers?

A. The same day.

771 Q. J. J. Isaacson?

[fol. 209] A. Same day.

772 Q. Mr. Harvey E. Milliken?

A. Same day.

773 Q. And Mr. Francis P. Matthews?

A. Also the same day.

774 Q. This same day you refer to, October of 1942?

A. That is right.

775 Q. When did you first meet Mr. Bob Samardick?

A. The same day.

776 Q. Now, if there is any profit or gain from your stock ownership, who, other than yourself, will participate in that gain?

A. None but my family.

777 Q. I will ask you if you read this allegation in the plaintiff's petition: "That the defendant officers of the Society did not, prior to the execution of the aforesaid lease, disclose to the Society's members the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single asset of the Society for a grossly inadequate consideration, and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to Consumers Public Power District." Did you read that allegation?

A. I heard it quoted.

778 Q. When did you first hear that the Consumers Public Power District was attempting to acquire the power [fol. 210] facilities here in Omaha which belong to the Nebraska Power Company?

A. I think I read about that in a trade publication in Chicago. It was, I believe, in the Broadcaster, which is one of the trade publications of our industry.

779 Q. Do you recall about when you read about that?

A. Well, I would like to augment that by saying that I think that I read it in a copy of the World-Herald which I took away with me the day that I left, after the incorporation meeting, or it was sent to me, but that was in October, 1942.

780 Q. Did you know about this proposed purchase prior to the time you came here for the incorporators meeting?

A. No, I did not.

781 Q. Do you have any opinion one way or another on the issue?

A. I do not.

782 Q. Does it make any difference to you whether the power facilities remain where they are or whether they are sold?

A. Not in the least. I have not studied the problem in any way, shape or form.

783 Q. Now, the plaintiff charges that the purpose of the lease was to procure the profits and benefits of the station for the officers of the Society, their friends and associates. Are you in any way associated with any of the officers of the Woodmen Of The World Life Insurance Society?

A. I am not.

784 Q. Do any of them, to your knowledge, have any interest in Radio Station WOW, Inc. whereby they person- [fol. 211] ally stand to gain or lose through its operation?

A. They do not.

785 Q. Do you have any knowledge of such a plan?

A. I do not.

786 Q. The plaintiff further alleges that Radio Station WOW, Inc., of which you are a stockholder, is dominated and controlled by the officers of the Woodmen of the World Life Insurance Society. Do you have any knowledge on that allegation?

A. I know that there has been no interference in the operation of the station WOW since we took it over January 14th. If there has been, I have not heard of it.

787 Q. Do you know who dominates and controls Radio Station WOW, Inc.?

A. I do.

788 Q. State whom.

A. The Board of Directors.

789 Q. Does anyone else, to your knowledge?

A. No, sir.

790 Q. Are any of the men constituting either the stockholders or the directors or officers of Radio Station WOW, Inc., to your knowledge, in any way related to any of the officers of the Life Insurance Society?

A. Not to my knowledge, no, sir.

791 Q. Are you?

A. No, sir.

792 Q. Do you know whether there is any arrangement whereby any friends or relatives of the officers of the Woodmen of the World Life Insurance Society shall be employed by the lessee company or in any way participate in its [fol. 212] management or operation?

A. I do not.

793 Q. Has any officer or director of the Woodmen Of The World Life Insurance Society ever suggested such a thing to you?

A. No, sir.

794. Q. Will you state to the Court the reason for your investing in the stock of Radio Station WOW, Inc.?

A. I consider it a good investment, which I imagine would be my principal reason. I think another reason would be the fact that I am not unlike many newspaper men, they have always had an ambition to become interested in a newspaper. In addition to that, I consider myself quite fortunate to be able to become associated with John Gillin.

795 Q. Has your business as a program builder enabled you to gain any experience whereby you could pass upon the adequacy of the amount of the rent that you will agree to pay?

A. I believe so, yes, sir.

796 Q. Have you participated in the leasing or sale of any radio station?

A. One attempt.

797 Q. When was that?

A. I can remember at one time I tried to make myself a solid dollar by selling Radio Station KNX in Hollywood to Metro-Goldwyn-Mayer Studios.

798 Q. When was that?

A. As near as I can remember, it would be around 1930.

[fol. 213] 799 Q. Did you succeed in making that sale?

A. No, sir.

800 Q. Why?

A. M-G-M Studios, in a nut shell, said they would not be interested in purchasing anything that was only licensed by the Government for three months at a time.

801 Q. Was that the license period in 1930?

A. At that time.

802 Q. Do you know what the license period is now?

A. Two years.

803 Q. What is your opinion on the amount of rent which Radio Station WOW, Inc. has agreed to pay the Woodmen of the World Life Insurance Society?

Mr. Stewart: That is objected to as incompetent and irrelevant, and no proper and sufficient foundation laid.

The Court: I don't think he has qualified himself yet.

Mr. Massey: We have witnesses who are managers rather than program builders. I think I will withdraw that question for the time being.

Cross-examination.

By Mr. Stewart:

804 Q. Mr. Wallace, have you had any experience in the management or operation of radio stations?

[fol. 214] A. No, I have not.

805 Q. Did you come out from Chicago to Omaha for this trial?

A I did.

806 Q. At whose request?

A. Mr. Massey's.

807 Q. You stated that the reputation of the station was one of the best six in the country.

A. Well, that is a personal opinion.

808 Q. Is that limited in some way, or just as stations go, you consider it as one of the best managed?

A. In my work in the advertising agency, Mr. Stewart, I am put in position where I can measure the services of radio stations throughout the United States, because we have placed business on as many as, oh, several hundred at a time, and in exploiting the program and exploiting the people that are on the program and trying to render a service to clients, it becomes necessary for us to call on radio stations for certain cooperation, not only on merchandising but in general exploitation. I believe that my judgment—and I say it is a personal opinion—will be substantiated by many men in my same phase of the industry, when I say that we have never received more cooperation and more local services from any radio station in the United States than we have WOW, if that answers your question.

809 Q. Do you know the past history of the station with reference to earnings?

A. To some extent.

[fol. 215] 810 Q. Do you know that it was operated for a number of years at a loss, and then gradually has increased its profits each year up to the present year?

A. Yes, sir, I am familiar with that fact.

811 Q. And in your opinion, who is entitled to the major credit for that accomplishment?

A. I think John Gillin, and I would like to augment that by saying that he has always surrounded himself with some very capable help.

812 Q. That is, you mean his staff of men on the radio?

A. His program directors, his engineers, supervisors and so forth.

813 Q. In your opinion, will that continue in the future, that progress that the station has made?

A. I think it will.

814 Q. Were you requested to assist in securing a purchaser for the new company?

A. No, sir.

815 Q. Or to assist in finding a buyer for the station?

A. No, sir.

816 Q. Or a lessee for the station?

A. No, sir.

817 Q. Did Gillin tell you of the earnings of the station in the past?

A. Yes, he did.

818 Q. You consider Gillin competent to run the station?

A. Very competent.

[fol. 216] 819 Q. Has there been some discussion of salary that he is to receive from the new company?

A. Yes, I believe there has.

820 Q. Do you remember what figure has been mentioned?

A. At our Board meeting, I believe in the middle of January—no; I will take that back. I don't recall that Gillin's salary was discussed at that particular meeting. There was a discussion of salaries of the personnel, but I don't believe that Gillin's salary was brought up.

821 Q. Were you present in the meeting where Mr. Milliken suggested that Gillin should receive a salary of $25,000 a year from the new company?

A. Yes, I believe I recall that that was—if my memory serves me correctly, at the meeting the day that we incorporated our new company.

822 Q. Do you expect to assist in the management of the company?

A. I do not.

823 Q. Do you believe that any of the other officers need to assist in the management of the company, assist Mr. Gillin?

A. No, I don't believe it will be. Developments will show that there is a great deal of confidence on the part of all our directors, so that if any business that has to be taken up at our regular meetings will be sufficient, and that they be called in. I have confidence—in fact, we might add this, that we are all quite anxious to maintain the present high standing of the station, and I am sure that any of the [fol. 217] directors will do anything possible. I have told John that at any time I can make calls for him, say in New York or Chicago, wherever I happen to be, I would certainly be glad to do it.

824 Q. About when did you pay for your stock, Mr. Wallace?

A. I wrote the check the day that we incorporated, which was October 3rd, I believe.

825 Q. And when did you receive your stock?

A. I think about a month ago.

826 Q. Perhaps you have answered: What was the amount that you paid for all of your stock?

A. $10,000.

827 Q. I am not sure I understood correctly—did you say that there was something in the World-Herald on the day that the company was incorporated, about the use of the station in connection with the Consumer's Public Power District's efforts to buy the Omaha power facilities?

A. I believe there was by inference, Mr. Stewart.

Cross-examination.

By Mr. Crossman:

828 Q. Mr. Wallace, I think you have covered this generally, and perhaps specifically, but you are here from Chicago, and I want to be perfectly specific about this, and I will ask you in one general question: Did you have, prior to the purchase of your stock in Radio Station WOW, Inc., or have you since had any arrangement directly or indirectly, openly or secretly, by inference or in any other way,

[fol. 218] with D. E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. C. Miller and Sterling C. Holston that they should have, or any of them, or their families, or their friends, or their associates, that any of them should have any interest whatsoever in your stockholding, ownership, title, rental income, earnings or any other interest? Now, that is a pretty long question. Have I made myself clear?

A. Yes, you have. I have not and I do not have, if that covers your question.

Mr. Crossman: That covers it. That is all.

Redirect examination.

By Mr. Massey:

829 Q. Mr. Wallace, do you know whether there is any connection between Radio Station WOW, Inc. and Consumers Public Power District?

A. Yes, I do.

830 Q. State what the fact is.

A. There is no connection whatever.

831 Q. Do you know whether or not a part of the time of the station is to be used to promote the sale of the power facilities here to the Consumers?

A. Well, I am sure that there is no such arrangement contemplated. In my opinion, that is substantiated by the fact that during all political campaigns, everybody, includ-[fol. 219] ing one of the employees, Foster May, who went on that radio station, paid for his time in full. And I am sure that any station that is protecting its good name and its good standing in the community to that extent, there is no belief or no basis for belief that they would deviate from that policy under the new management, the management that we want to make more effective than it has ever been in the past, and I know I speak for myself when I say I would not approve such exploitation of the use of the station.

832 Q. Mr. Gillin's salary was brought up on cross-examination. Do you know managers of radio stations throughout the country comparable to the Woodmen of the World—do you know what they have been paid throughout the country?

A. I do.

833 Q. Do you know what salaries the managers receive?

A. I cannot speak accurately on that, no. All I can give you is what I have heard, but I haven't any accurate information.

834 Q. Well, that would be hearsay. In the reports made to the Federal Communications Commission are the salaries of the managers set forth?

A. Yes, I believe they are.

835 Q. Have you seen any reports?

A. I have seen some reports, Mr. Massey, but I don't think I could connect them up with any specific figure.

836 Q. Well, taking into consideration the standing of this station, its frequency, its power, and the duties which Mr. Gillin will have as president and general manager, and the [fol. 220] services which he renders, his experience, do you have an opinion as to what the fair and reasonable salary of Mr. Gillin would be? Just answer that yes or no.

A. Yes.

837 Q. Will you state what your opinion is?

A. In my opinion—and this goes back to the first time that I heard how much money John was getting for conducting the affairs of WOW, I thought he was underpaid quite radically. I think my opinion would say that conditions being favorable so that he could be paid such salary, and the station's earnings were enough to justify it, that the man was worth twice as much as the minimum as he was getting before.

838 Q. What was the figure that you heard that he was getting?

A. $16,000.

Recross-examination.

By Mr. Stewart:

839 Q. What earnings did you understand the station was then making?

A. What do you mean by that, Mr. Stewart?

840 Q. Was then making. I mean when Gillin was getting $16,000 a year.

A. I believe the last official figure that I saw at that particular time was somewhere around $175,000.

841 Q. Do you know what year that was for, Mr. Wallace?

A. Well, I think the $175,000 was quoted to me as the

earnings for 1941. This was during the discussion that Mr. Gillin and I had in my office at approximately June, 1942.

[fol. 221] 842 Q. In fixing what you considered a reasonable salary for Mr. Gillin did you have in mind that in the management of the station he would act as president as well as manager?

A. Yes, that is our understanding.

843 Q. And that he would be the only officer of the company that would receive a salary?

A. Yes. That is, we have no provision for anyone else receiving a salary.

844 Q. Did I understand you to say, Mr. Wallace, that you do not approve of the use of the station for sponsoring the sale of the Omaha power facilities to the Consumers?

A. Not unless we also had a right and privilege and time to offer to any opposition opinion. I think it is kind of hard to say today what you would be in favor of, because it might be to the interest of the community to open the subject up and go on WOW and have it discussed pro and con, so I would not like to make the statement that I would be opposed to it.

845 Q. What was it you said about not approving the exploitation of the station for the use in connection with the sale of the Omaha power facilities?

A. I meant to convey that I did not think it would be proper use of the station.

Mr. Stewart: I think that is all.

Mr. Wells: Stand aside.

Mr. Crossman: That is all. Any question by your Honor, because Mr. Wallace probably will be leaving.

[fol. 222] The Court: I don't think of any.

Witness excused.

JOHN J. GILLIN, JR. called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

846 Q. Will you state your name, residence and occupation, please?

A. John J. Gillin, Jr., 517 South 38th Avenue, Omaha, Nebraska; president and general manager of Radio Station WOW, Inc.

847 Q. How old are you, Mr. Gillin?

A. I was thirty-eight years old yesterday, March 1st.

848 Q. How long have you been connected with Radio Station WOW?

A. Since November 1, 1929.

849 Q. Were you general manager of that station?

A. Yes, sir.

850 Q. When did you become manager?

A. On January 1, 1932.

851 Q. How long did you continue as manager of the station?

[fol. 223] A. I continued as manager of Radio Station WOW until January 14th, at 11:00 P. M., 1943.

852 Q. Up to that time you were managing the station for the Woodmen of the World Life Insurance Society?

A. That is right, sir.

853 Q. What compensation did you receive for your services in 1942?

A. $16,000.

854 Q. Was that your regular salary that year?

A. That was my salary that year.

855 Q. Did you receive any additional amounts for your services?

A. No, sir.

856 Q. Or any bonus or any gifts of any kind last year from the Society?

A. I believe that the Society paid all of its employees a bonus based upon the bonus basis of the company; that is, the Society itself.

857 Q. And how much did you personally receive then in the form of a bonus?

A. I cannot recall. I can get that figure for you.

858 Q. Just approximately.

A. Oh, it was a nominal amount. I don't remember the exact amount. I believe that Mr. Pakes can tell me.

Mr. Pakes, could you tell me?

Mr. Pakes: About $200.

A. (Continuing) About $200.

859 Q. What compensation did you receive from the Society in 1943?

[fol. 224] A. This is 1943.

860 Q. Yes; that is right.

A. I received my salary from the Society up to and including January 14th, 11:00 P. M.—that is, from January 1st to January 14th, at 11:00 P. M., I was in the employ of the Society.

861 Q. What amount did you receive for that service?

A. I believe it was one-half month's salary.

862 Q. At the rate of $16,000 a year?

A. $16,000 a year, yes, sir.

863 Q. Have you received any other amounts from the Society in the year 1943?

A. No, sir.

864 Q. What is the standing and reputation of Station WOW, in your opinion?

A. Radio Station WOW has the reputation of being one of the outstanding radio stations in the United States for public service as well as the programs that are broadcast from the standpoint of networks as well as local.

865 Q. In years past has the station made an announcement that it was owned by the Society, that is, announcements over the radio?

A. Yes, sir.

866 Q. When was that, or is that still continuing?

A. No.

867 Q. When was that discontinued?

A. I believe the last day that the announcement was made [fol. 225] was on January 14th, at 5:45 A. M.—in the morning.

868 Q. Has the number of times that that announcement was made over the station during the times the Society operated it increased or decreased in recent years?

A. I believe it decreased in recent years, and that was because of the commercial schedule.

869 Q. How many times was it being announced during the day during the year 1942?

A. I would say maybe two or three times, unless we had a specific program on, like the NBC Symphony, which was unsponsored at the time.

870 Q. How many times was it announced, approximately, in the year 1941?

A. In 1941, I think about the same number of times.

871 Q. And in 1940?

A. 1940, I would say about twice as many times, because the schedule was not as heavy then as it is now, the commercial schedule.

872 Q. And in 1939, about how many times a day?

A. Well, I will tell you frankly, Mr. Stewart, the only way that I could testify to that question accurately would be to get the log of Radio Station WOW for the full year from the Federal Communications Commission; we could do it, but it would take some time and effort to do it.

873 Q. I didn't ask you to give it accurately. Can you state approximately five years ago how many times that [fol. 226] announcement was made a day?

A. No, I could not tell you, but I may tell you this, but I believe it is wrong—oh, twice as many times a day as we did in 1942, but that would not be accurate.

874 Q. Has the station, in your opinion, created goodwill for the Society?

A. I believe it has.

875 Q. Has it helped to advertise the Society?

A. I believe it has helped to advertise the Society, but I do not believe it has helped to increase the Society's membership in the territory in which we cover.

876 Q. When did you first learn that a lease or sale of the station was contemplated, the approximate date?

A. I believe sometime in April, 1942.

877 Q. And from what source did you learn it?

A. From Mr. De Emmet Bradshaw, the president of the Woodmen of the World Life Insurance Society.

878 Q. Did Mr. Bradshaw tell you why the leasing or sale of the station was being considered?

A. Yes, sir.

879 Q. Mr. Gillin, to refresh your recollection, your deposition was taken in this case, wasn't it, several months ago?

A. Yes, sir.

880 Q. At that time were you not asked this question: "Did Mr. Bradshaw at that time tell you why the leasing or sale of the station was being considered?" And did you not [fol. 227] answer: "No, sir."?

A. Yes, I did at that time say "no, sir".

881 Q. And was that the fact?

A. That was the fact, but he told me later. I mean from the standpoint of the conversations that continued later on, he did tell me.

882 Q. He did not tell you at that time?

A. No, not this specific date.

883 Q. Did Mr. Bradshaw request on that day in April, 1942 that you do anything in connection with the lease or sale of the station?

A. Yes. He stated that I ought to contact my friends, and I believe Mr. Bradshaw specifically mentioned my friends, Mr. Clarke Swanson, Gilbert Swanson, their father Mr. C. A. Swanson. I cannot say it was that specific date when he first mentioned it to me, but shortly thereafter he did.

884 Q. What else did he say to you that day in connection with your participating in the lease or sale of the station?

A. Well, we talked merely about sale at that time.

885 Q. Well, what else did he say about your participating in the sale of the station at that time?

A. Well, he stated that he would like to have me see if I could not contact these gentlemen and see if they would be interested in purchasing Radio Station WOW, and I told him I had friends that I knew would be interested, and I thought the Swansons would be interested and I would like to take it up with them.

[fol. 228] 886 Q. To refresh your recollection, Mr. Gillin, at that time when your deposition was taken were you not asked the question: "Did Mr. Bradshaw request that you do anything in connection with the lease or sale of the station?" And did you not answer: "He stated to me that the Society would like very much if I would consider making a deal for the sale of the station because of the fact that the Society felt that I had been with the station for a long period of time and had in a minor way been responsible for some of its success, and he wondered if I had any friends who would be interested in it, and I told him I certainly thought that I had friends who would be vitally interested in it"?

A. Yes.

887 Q. You were asked that question and so answered it?

A. That is right.

888 Q. And that is correct, is it?

A. That is right.

889 Q. Did Mr. Bradshaw state at that time what amount of money he wanted for the station?

A. Yes, sir.

890 Q. What did he say as to the amount?

A. $850,000.

891 Q. Later a lease was submitted or given to you by Mr. Bradshaw covering the station, was it?

A. The lease arrangement came up after we found that it would not be practical to purchase the station and have it [fol. 229] pay out because of the tax laws at the present time.

Mr. Stewart: Just a minute, Mr. Gillin. I move to strike the answer as not responsive. Just answer the question; it will save us trouble.

Mr. Massey: It seems to me that explanation of his answers the rental part of it.

Mr. Stewart: It is not at all. I didn't ask him about why they undertook the leasing arrangement, or what the reason was for changing from a sale to a lease. I simply asked whether he was submitted a lease.

The Court: I think it is not responsive.

Mr. Stewart: Then it will go out?

The Court: Yes.

892 Q. Now, Mr. Gillin, the question is whether Mr. Bradshaw submitted a lease to you later, of the station; just yes or no.

A. Well, I believe in order to answer that question today I ought to explain that the lease—(interrupted)

The Court: Your counsel will do that on his cross-examination.

The Witness: Yes, your Honor.

A. (Continuing) The answer is "yes".

893 Q. Was there a provision in that lease for transferring to the new company $25,000 in accounts receivable?

A. Yes, sir.

894 Q. Was there a provision in that lease which Mr. Bradshaw submitted to you for the transfer of the good-will of the station?

[fol. 230] A. Yes, sir.

895 Q. Was there a provision in that lease that it could be terminated by the lessee in the event the license to operate the station was cancelled?

A. In the event that the license was cancelled by the Federal Communications Commission it would return to the Woodmen of the World Life Insurance Society.

896 Q. The question is whether there was a provision in the lease that gave the lessee the option to terminate the lease in the event the license to operate the station was cancelled.

Mr. Crossman: We don't object to this, but you are inquiring about a written instrument. It is in the pleadings.

The Court: I think what he has in mind, one of them, is in reference to the $25,000.

Mr. Crossman: This question has no reference to the previous question.

Mr. Stewart: Well, the lease that was submitted to him by Mr. Bradshaw.

Mr. Wells: Well, it has not been shown yet that is the lease that was signed.

Mr. Crossman: If you are impeaching the witness' answer there, I don't think you have told him so.

A. No. I have been presuming all the time that you were referring to the lease that was signed.

897 Q. Well, is the lease that was eventually signed the [fol. 231] one that was first submitted to you by Mr. Bradshaw?

A. No, sir.

898 Q. Did the first lease that Mr. Bradshaw submitted to you have a provision in it for transferring to the new company $25,000 in accounts receivable?

A. Yes, sir.

899 Q. Did it have a provision in it for the transfer of the good-will of the station to the lessee?

A. Yes, sir.

900 Q. Did it have in it a provision that the lease could be terminated at the option of the lessee in the event the license to operate the station was cancelled?

A. Yes, sir.

901 Q. In your negotiations for the lease of the station, who represented the new company?

A. I represented the new company.

902 Q. And who represented the Society?

A. Mr. Bradshaw and Mr. Ruess. Mr. Braden was brought into the conference on several occasions, and I believe that Mr. Wells looked the lease over and made certain specific remarks about it and concerning it.

903 Q. Did Mr. Bradshaw suggest to you the names of any of the eight persons that became stockholders in the new company?

A. He suggested to me Mr. Myers.

904 Q. Which Mr. Myers?

A. Mr. Guy Myers, and Mr. Milliken.

[fol. 232] 905 Q. And did he also suggest Mr. M. M. Meyers?

A. I don't recall. I think we discussed that together. I think that—I don't recall whether it was his suggestion or my suggestion that I would like to have Mr. Myers associated with me.

906 Q. Did he also suggest Mr. Matthews?

A. No. I suggested Mr. Matthews. I suggested Mr. Wallace.

907 Q. What was the reason for including in the lease the transfer of the $25,000 of accounts receivable to the new company?

A. What was the suggestion for the $25,000?

908 Q. (Read by the reporter.)

A. So that we would have $100,000 in operating capital, and the $25,000 included in the lease agreement is paid back over a period of fifteen years, just like the lease on the furniture and the desks and equipment that we have at Radio Station WOW, they are paid back in lease payments extending over fifteen years, the $25,000.

909 Q. At the end of the lease are you required to then return to the Society $25,000 in accounts receivable?

A. No, because we have paid it back in lease payments over the period of fifteen years.

910 Q. Who selected the men who became stockholders in the new company?

A. You mean the final decision?

911 Q. Did you secure the approval of Mr. Bradshaw as to those whom you were selecting?

A. No, sir.

[fol. 233] 912 Q. Did you tell him whom you were selecting?

A. I told him whom I was selecting, yes.

913 Q. Did he object to any of them?

A. No, sir.

914 Q. Do you recall what he said about the men in the new company, with reference to their being men that you selected?

A. No, except that he stated that he thought I had a fine crew, some such remark as that, because of the fact that

they were all men that were civic-minded, interested in the city, except Mr. Myers and Mr. Wallace, of course, who did not live here, but the other men have all been civic-minded and active in the city here for many years.

915 Q. How many different classes of stock are there in the new company?

A. There are Preferred A, Preferred B and the common stock.

916 Q. What is the par value of those shares of stock?

Mr. Crossman: Just a minute. I don't want to be captious about this. There are articles of incorporation that tell all these things. We just gave Mr. Stewart a photostatic copy of it, and it seems to me you ought not need to inquire about a written document. The proper way to inquire about a written document is to produce it or offer it in evidence, and then we know about it. We have been doing the same thing about this lease. When we have a written document we don't have to guess as to whether it says this or whether it says that.

[fol. 234] Mr. Stewart: May it be stipulated that Exhibit 12 is a true copy of the Articles of Incorporation?

Mr. Crossman: You offer it and we will make no objection to it.

Mr. Wells: Photostatic copy.

Mr. Stewart: The plaintiff offers in evidence Exhibit 12, being a photostatic copy of the Articles of Incorporation of Station WOW, Inc.

Mr. Crossman: And there is no objection.

The Court: It is offered in evidence?

Mr. Stewart: Yes.

The Court: Received.

Mr. Crossman: Without objection.

[fol. 235] EXHIBIT "12"

Articles of Incorporation of Radio Station WOW, Inc.

First: The name of the corporation is Radio Station WOW, Inc.

Second: The principal office or place of business of the corporation in the State of Nebraska is located at ———, in the City of Omaha, County of Douglas, and the name and address of its resident agent is John J. Gillin, whose address is 1708 Farnam St., Omaha, Nebraska.

Third: The nature of the business or objects or purposes to be transacted, promoted or carried on by the corporation are as follows:

(1) To engage in the business of radio broadcasting and to do all things incidental thereto.

(2) To broadcast, disseminate, distribute, transmit, retransmit, receive or collect, by means of electricity, magnetism or electro-magnetic waves, variations or impulses or by any other means, music, instruction, entertainment, news, speeches, sermons, advertising, educational and informative matter, photographs, images, pictures, scenes, plays, views, or any of them, or combinations of any of them, for the purpose of entertainment, instruction or information, or to be so utilized by the persons receiving the same; and to provide and furnish for the use of others facilities for any of such purposes.

[fol. 235a] (3) To originate, arrange, provide, buy, sell and distribute, with or without compensation, programs consisting of or containing the matters or things enumerated in the preceding paragraph, for broadcasting, dissemination or distribution by means of electricity, magnetism or electro-magnetic waves, variations or impulses; and to contract with and engage the services of artists and others for the purpose of providing such programs.

(4) To purchase, hire, acquire, construct, establish, maintain, manage, operate, improve, sell, lease, mortgage, or otherwise dispose of, stations, studios, plants, systems, wires, underground or other circuits, and any and all machinery, apparatus and equipment incidental or necessary to the conduct of any of the purposes herein stated.

(5) To lease, sublease or license others to use, the lines, systems or circuits, stations, studios, and any other facilities of the corporation, to persons, firms, associations or corporations, public or private, for compensation or otherwise, for such period of time and under such conditions as the corporation may determine.

(6) To receive, generate, produce, control, furnish, sell, or otherwise utilize in any manner whatsoever, and for any and every purpose, electricity, magnetism, and electro-magnetic, radio and every other kind of waves, power, energy, force, variations and impulses; to create, install and operate systems or circuits of communication which may be intrastate, interstate or international; to engage in research and experimental work in, and to develop and prosecute the art and business of, electric communication, including each and every type of radio, wireless, telegraph and telephone communication.

(7) To compose, print, publish, distribute, sell, or otherwise dispose of, programs, music, plays, magazines, books, pamphlets and other literature, and to acquire, hold, use, sell or in any manner dispose of or deal with copyrights or other rights connected with the same.

[fol. 235b] (8) To carry on advertising campaigns for the promotion of the good will of the public toward the corporations and its customers and to carry on a general advertising business.

(9) To manufacture, purchase or otherwise acquire or mortgage, pledge, sell, distribute, warehouse; import, export, invest, trade, deal in and with and traffic in, all articles, goods, wares, merchandise and personal property of every class and description.

(10) To purchase, acquire, build, manage, operate, lease, own, hold, exchange, sell, mortgage or otherwise encumber, lease, sublease, and convey real estate, either improved or unimproved and any interest or right therein, and to erect, construct, operate, maintain, improve, rebuild, enlarge, alter, manage or control any and all kinds of houses, plants, buildings, stores, offices, equipment, machinery, and any and all buildings or structures which may be at any time useful or advantageous for the purposes of the corporation, either within or without the State of Nebraska.

(11) To subscribe to, purchase, acquire, hold, own, invest in, sell, assign, transfer, mortgage, pledge or otherwise dispose of or deal in the stocks, bonds, debentures or other securities and obligations of any other

corporations, domestic or foreign; and also to issue in exchange therefor its stocks, bonds and other obligations, and to possess and exercise in respect thereof all the rights, powers and privileges of individual owners thereof, including any and all voting powers.

(12) To apply for, purchase or acquire, and to exercise, carry out and enjoy any license, power, authority, franchise, right or privilege, which any government or authority, or any corporation or other public body shall enact, make or grant.

[fol. 235c] (13) To acquire all or any part of the good will, rights, properties, and business of any person, entity, partnership, association or corporation heretofore or hereafter engaged in any business similar to any business which the corporation has any power to conduct and to pay for the same in cash or in stocks, bonds or other obligations of the corporation or otherwise; to hold, utilize and in any manner dispose of the whole or any part of such rights and properties, and to assume in connection therewith any liabilities of any such person, entity, partnership, association or corporation, and to conduct in any lawful manner the whole or any part of the business thus acquired.

(14) To make any guaranty respecting stocks, dividends, securities, indebtedness, interest, contracts or other obligations so far as the same may be permitted to be done by a corporation organized under the laws of Nebraska.

(15) To borrow money for any of the purposes of the corporation from time to time without limit as to amount; to draw, make, accept, endorse, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures and other negotiable and non-negotiable instruments and evidences of indebtedness; and to secure the payment thereof and of the interest thereon by mortgages on or pledge, conveyance or assignment in trust of, the whole or any part of the assets of the corporation, real, personal or mixed, including contract rights, whether at the time owned or thereafter acquired, and to sell, pledge or otherwise dispose of such securities or other obligations of the corporation for its corporate purposes.

(16) To purchase, hold, sell, transfer, reissue or cancel shares of its own capital stock or of any securities or other obligations of the corporation in the manner and to the extent now or hereafter permitted by the laws of Nebraska.

[fol. 235d] (17) To apply for, obtain, register, purchase, lease or otherwise to acquire, and to hold, own, use, develop, operate and introduce, and to sell, assign, grant licenses or territorial rights in respect to, or otherwise to turn to account or dispose of, any copyrights, trademarks, trade names, patent rights, letters patent of the United States or of any other country or government, inventions, improvements and processes either used in connection with or secured under letters patent or otherwise.

(18) In general, to carry on any business not contrary to the laws of Nebraska, and to have and exercise all the powers conferred by the laws of Nebraska upon corporations formed thereunder, and to do any and all of the acts and things herein provided for to the same extent as natural persons could do, and in any part of the world, as principal, factor, agent, contractor or otherwise, either alone or in conjunction with one or more persons, entities, syndicates, partnerships, associations and/or corporations; to establish and maintain offices and agencies within and anywhere outside of the State of Nebraska; and to exercise all or any of its corporate powers or rights in the State of Nebraska and in any and all other states, territories, districts, colonies, possessions or dependencies of the United States of America and in any foreign countries.

(19) To do everything necessary, proper, advisable or convenient for the accomplishment of any of the purposes or the attainment of any of the objects or the furtherance of any of the powers herein provided for, and to do every other act and thing incidental thereto in connection therewith, provided the same be not forbidden by the laws of Nebraska.

[fol. 235e] The foregoing clauses shall be construed both as objects and powers; and it is hereby provided that the foregoing enumeration of specific powers shall not be held

to limit or restrict in any manner the powers of the corporation, and are in furtherance of and in addition to, and not in limitation of, the general powers conferred by the laws of the State of Nebraska; it is the intention that the purposes, objects and powers specified in the foregoing paragraphs shall, except as otherwise expressly provided, in nowise be limited or restricted by reference or inference from the terms of any other clause or paragraph hereof, and that each of the purposes, objects and powers specified therein shall be regarded as independent purposes, objects and powers.

Fourth: The total number of shares of all classes of stock which the corporation shall have authority to issue is Two thousand (2,000) shares of the par value of $1.00 each, of which Seven hundred and fifty (750) shares shall be Preferred Stock Class A, Two hundred and fifty (250) shares shall be Preferred Stock Class B, and One thousand (1,000) shares shall be Common Stock.

The designations, preferences and relative participating, optional or other special rights, and the qualifications, limitations or restrictions thereof, of each class of stock shall [fol. 235f] be as follows:

(1) The Preferred Stock Class A shall be designated as "Preferred Stock Class A." The Preferred Stock Class B shall be designated as "Preferred Stock Class B." The Preferred Stock Class A and the Preferred Stock Class B are hereinafter collectively called "Preferred Stock."

The holders of Preferred Stock shall be entitled to receive out of funds available for dividends, when and as declared by the board of directors, dividends thereon at the rate of Seven Dollars ($7.00) per share per annum, payable quarterly on the last business day of March, June, September and December in each year, such dividends to accrue from the dividend date next preceding the date of issue, or from the date of issue if the date of issue coincides with the dividend date. Such dividends shall be cumulative, and if the corporation shall fail to pay such dividends quarterly on all of the outstanding Preferred Stock, all such cumulative dividends shall be paid, but without interest, before any dividends shall be declared or paid on the Common Stock.

Upon any dissolution or liquidation of the corporation, whether voluntary or involuntary, there shall be paid to the holders of Preferred Stock One Hundred Dollars ($100) per share, plus an amount equal to any accumulated or accrued dividends thereon to the date of payment, before any sums shall be paid to or any assets distributed among holders of any other class of stock.

The Preferred Stock may be called for redemption, in whole or in part, on the last business day of March, June, September and December in any year at the option of the board of directors, by mailing notice thereof to the holders of record of the shares to be redeemed at least sixty days prior to the date fixed for redemption, and such shares may be redeemed by paying for each share so redeemed the sum of One Hundred Dollars [fol. 235g] ($100). plus an amount equal to any accumulated or accrued dividends thereon to the date of payment; provided, however, that no part of the Preferred Stock Class B shall be called for redemption unless all of the outstanding Preferred Stock Class A shall theretofore have been redeemed or shall be called for redemption simultaneously therewith. Any redemption of only a part of the outstanding Preferred Stock Class A or Preferred Stock Class B, as the case may be, shall be made pro rata among the record holders of the class of stock being redeemed according to their holdings as far as may be without redeeming fractional shares. From and after the date fixed in any such notice as the date of redemption, unless default shall have been made in providing for the payment of the redemption price in pursuance of such notice, all dividends on the Preferred Stock thereby called for redemption shall cease to accrue, and all rights in the holders thereof as stockholders of the corporation, except the right to receive the redemption price, without interest, shall cease and terminate. Preferred Stock redeemed shall not be reissued.

(2) The Common Stock shall be designated as "Common Stock."

Subject to all the rights of the Preferred Stock, dividends may be paid on the Common Stock when and as declared by the board of directors out of funds available therefor.

Upon any dissolution or liquidation of the corporation, whether voluntary or involuntary, after the holders of Preferred Stock shall have been paid in full the amounts to which they respectively shall be entitled, all remaining assets and funds shall be distributed pro rata to the holders of the Common Stock.

Fifth: The minimum amount of capital with which the corporation will commence business is One Thousand Dollars ($1,000).

[fol. 235h] Sixth: The names and places of residence of the incorporators are as follows:

Names	Residences
John J. Gillin	Omaha, Nebraska
Guy C. Myers	Seattle, Wash. & New York City
M. M. Meyers	Omaha, Nebraska
Harvey E. Milliken	Omaha, Nebraska
Francis P. Matthews	Omaha, Nebraska
J. J. Isaacson	Omaha, Nebraska
Thomas J. Wallace	Chicago, Illinois
Robert Samardick	Omaha, Nebraska

Seventh: The corporation is to have perpetual existence.

Eighth: The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Ninth: The following provisions are inserted for the regulation of the business and conduct of the affairs of the corporation, and it is expressly provided that the same are to be in furtherance and not in limitation or exclusion of the powers conferred by statute or otherwise:

(1) All corporate powers of the corporation shall be exercised by the board of directors, except as otherwise by law or herein provided. Directors need not be stockholders of the corporation. The board of directors may, by resolution or resolutions passed by a majority of the whole board, designate one or more committees, each committee to consist of two or more directors of the corporation, which, to the extent provided in said resolution or resolutions or in the by-laws [fol. 235i] of the corporation, shall have and may exer-

cise the powers of the board of directors and the management of the business and affairs of the corporation, and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the by-laws of the corporation or as may be determined from time to time by resolution adopted by the board of directors.

(2) The number of directors which shall constitute the whole board of directors of the corporation shall be such as from time to time shall be fixed by or in the manner provided in the by-laws, but in no case shall the number be less than three (3). In case of any increase in the number of directors, the vacancy or vacancies created by such increase shall be filled in the manner provided in the by-laws.

(3) The stockholders and the directors may hold their meetings and have an office or offices outside of the State of Nebraska, if the by-laws so provide.

(4) It is not necessary that any director of the corporation be a resident of the State of Nebraska.

(5) Subject to any limitation contained in the by-laws made by the stockholders, the board of directors may make by-laws and from time to time may alter, amend or repeal any by-laws, but any by-laws made by the board of directors may be altered, amended or repealed by the stockholders at any meeting of stockholders by the affirmative vote of the holders of a majority of the stock present and voting at such meeting, provided that notice of the proposed change is contained in the notice or waiver of notice of such meeting.

(6) The board of directors shall have power from time to time to fix and determine and to vary the amount of the working capital of the corporation, to direct and determine the use and disposition thereof, to set apart out of any funds of the corporation available for dividends a reserve or reserves for any proper purposes, and to abolish any such reserve in the manner in which it was created.

[fol. 235j] (7) The board of directors may from time to time determine whether and to what extent and at

what times and places and under what conditions and regulations the accounts and books of the corporation or any of them shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account book or document of the corporation, except as conferred by statute or as authorized by the board of directors.

(8) The corporation may enter into contracts and transact business with one or more of its directors or with any firm with which one or more of its directors are members or with any corporation or association in which any of its directors are stockholders, directors or officers, and such contract or transaction shall not be invalidated or in anywise affected by the fact that such director or directors have or may have interests therein which are or might be adverse to the interests of the corporation, even though the vote of the director or directors having such adverse interest shall have been necessary to obligate the corporation upon such contract or transaction; and no director or directors having such adverse interest shall be liable to the corporation or to any stockholder or creditor thereof or to any other person for any loss incurred by it under or by reason of any such contract or transaction; nor shall any such director or directors be accountable for any gains or profits realized thereon; provided always that such contract or transaction shall, at the time at which it was entered into, have been a reasonable one to have been entered into and shall have been upon terms that at the time were fair.

Tenth: The corporation reserves the right to amend, alter, change or repeal any provisions contained in these articles of incorporation in the manner now or hereafter prescribed by statute, and all rights herein conferred upon stockholders or others are granted subject to this reservation.

[fol. 235k] Eleventh: The affairs of this Corporation shall be conducted by the following named persons who shall constitute the Board of Directors:—

John J. Gillin, President; Guy C. Myers, Vice President; M. M. Meyers, Secretary; Harvey E. Milliken,

Treasurer; Francis P. Matthews, J. J. Isaacson, Thomas J. Wallace, Robert Samardick

who shall hold their offices until their successors are elected and qualified, a majority of whom shall constitute a quorum for the transaction of business.

[fol. 235l] We, the undersigned, being all of the incorporators herei-before named for the purpose of forming a corporation in pursuance of the General Corporation Law of the State of Nebraska, do execute these articles, hereby declaring and certifying that the facts herein stated are true and, accordingly, have hereunto set our respective hands and seals this 2nd day of October, 1942.

John J. Gillin, Jr., M. M. Meyers, Thomas J. Wallace, Guy C. Myers, J. J. Isaacson, H. E. Milliken, Robert P. Samardick, Francis P. Matthews.

STATE OF NEBRASKA,
County of Douglas, ss.:

Personally appeared before me the *the* undersigned, a Notary Public within and for the above named County and State, the following persons to wit:

John J. Gillin, Jr., M. M. Meyers, Thomas J. Wallace, Guy C. Myers, J. J. Isaacson, H. E. Milliken, Robert P. Samardick, Francis P. Matthews

known to me to be the identical persons who signed the [fol. 235m] foregoing Articles of Incorporation and in my presence acknowledged that they signed the same as their voluntary act and deed and that the facts therein stated are truly set forth.

In Witness Whereof I have hereunto set my hand and affixed my Notarial Seal at Omaha, Nebraska, on this the 2nd day of October, 1942.

Katherin V. Peterson, Notary Public. My Commission expires on the 1st day of Sept., 1944.

(Here follows 1 photolithograph, side folio 235n)

1159

Articles of Incorporation
of
Radio Stadiord W.O.W
Inc.

State of Nebraska
Douglas County } ss

Recorded and filed for record
the 3 day of
October 1942 as recorded
in book 22 of Incorp.
Records on page 632

John Lisack
County Clerk

10/3/42

15247 12:00 3 25

235n

[fol. 236] 919 Q. Mr. Gillin, what is the reason for having both A and B preferred stock in the new company?

A. The reason for having both A and B preferred stock was because of the fact that I had made this deal and the new directors of the company decided the B stock would be mine, that I should pay $1.00 a share for it, and it would not be retired in the same manner and at the same time as the preferred A stock, but it would give me enough stock in the company so that I would have a sufficient voice in the management of it, and also in what the station was going to be in the coming years under which we would operate; also they decided at the first meeting of the new company that I would get all the B preferred stock, and, as you know, I bought $10,000 worth of the A stock, preferred A stock, at $99.00 a share.

920 Q. Then what common stock do you own in the company?

A. I hold, I think it is—let's see—1,000—100—I think it is 350 shares in common stock.

921 Q. For which you paid a dollar a share?

A. Paid a dollar a share for the common. As you know, in the State of Nebraska, your preferred stock and your common stock must all have the same par value.

922 Q. And you paid a dollar a share for the preferred B stock?

A. And I paid a dollar a share for the preferred B.

923 Q. 250 shares of that?

[fol. 237] A. Yes, sir.

924 Q. And 250 shares of the preferred A stock?

A. No. I paid for 100 shares of the A preferred stock.

925 Q. Yes, 100 shares of the A stock. Which stock is subject to retirement first, the A or the B stock?

A. The A stock is subject to retirement first under our Articles of Incorporation.

926 Q. At what price is the A stock retirable at?

A. Retired at the same amount that was paid for it, that I paid for it, $99.00 a share.

927 Q. Then when the preferred stock A is retired, how many shares of stock will you hold in the company?

A. I will hold 250 shares of preferred B, and I will hold 350 shares of common stock.

928 Q. Which would be a total of 600 shares?

A. That is, if all the preferred A stock is retired. That was your question?

929 Q. Yes. And how many other shares of stock will then be outstanding?

A. There would be 650 shares of common stock outstanding.

930 Q. Did you employ the firm of Breed, Abbott & Morgan in New York City as attorneys for the new company?

A. Yes, sir.

931 Q. Was that when you and Mr. Guy Myers first saw one of the members of their firm?

A. Besides Mr. Payton.

[fol. 238] 932 Q. For what purpose were they employed?

A. They were employed for the purpose of helping to draw up the lease agreement.

933 Q. And did they assist in that way?

A. Yes, sir.

934 Q. Did you know at that time that that firm of attorneys were one of the firms of attorneys representing Guy Myers in connection with the Consumers Public Power District deal here in Omaha?

A. No, sir.

935 Q. What other attorneys represented the new company besides Breed, Abbott & Morgan?

A. At that time?

936 Q. Yes, or later.

A. Later, why, I brought Mr. Massey in to look the lease over because of the fact that he was my attorney.

937 Q. Any other attorney that represented the new company?

A. And then, of course, Mr. Matthews looked over the lease on the day the incorporation took place.

938 Q. Did you know that Mr. Matthews was attorney for the Consumers Public Power District in connection with the Omaha deal?

A. I knew that Mr. Matthews had done some work for the Consumers Public Power, but I did not know that he was their exclusive attorney. I don't know yet that he is their exclusive attorney.

939 Q. As president and general manager of the new company do you have any agreement as to your salary?

A. The Board of Directors on January the 15th, at the [fol. 239] insistence of our tax counsellor, set my salary because of the fact that the salaries of the station's staff had to be set by March 1st with the War Labor Board in

Kansas City, and they said, "You are a member of the staff, and therefore your salary"—the tax counsellor said, "Your salary must be set too."

940 Q. Well, in what amount?

A. $25,000 a year.

941 Q. Was the salary of any other officer of the company set at that time?

A. No, sir.

942 Q. Do you contemplate paying salaries to any of the other officers of the company?

A. I don't know how we can contemplate paying a salary to the other officers of the company until we find out just exactly what their duties are and establish those duties with the War Labor Board. You've got to be able to produce the records before you can pay any salary to them.

943 Q. Are those other officers of the new company performing any services?

A. I called upon Mr. Myers a number of times, the secretary of the company, and I have called on Mr. Milliken a great number of times for advice, and certainly talked to Mr. Matthews not only in Canada on his way to Europe, but in New York on long distance on several occasions, and also in his own office. There are a lot of things that you've got to take into consideration in running a radio [fol. 249] station that you need very competent advice on?

944 Q. But the services that have been rendered by those officers is not sufficient yet to justify a salary to them, is that right?

A. Well, I would rather put it this way: That before we pay any salary to any executive officer that we have got to show a record of their performance, and that must be done for the War Labor Board.

945 Q. When do you expect to do it, Mr. Gillin?

A. I would also like to state that the War Manpower Commission will not approve any salaries that are not within reason and in performance of duty and along the same line with other radio stations.

946 Q. Are there any officers of the new company that expect to participate in the actual management of the station?

A. No, sir.

947 Q. How long have you known Mr. Bradshaw, approximately?

A. The first time I met Mr. Bradshaw was in, I believe, 1926 or 1927. I was in the service of the Seventh Corps Area at that time, which is now the Seventh Service Command, as a Captain in the Legal Division, or what is commonly called the Judge Advocate's Division, and I needed some cases and I went over——(interrupted)

948 Q. Never mind the explanation.

A. Went over to the office of the general counsel.

The Court: Let him answer that.

Mr. Stewart: I did not ask him for the details of it. [fol. 241] I asked him when.

Mr. Crossman: May he answer, Judge?

The Court: Yes.

A. (Continuing): I went to Mr. Bradshaw's office. He, at that time, was general counsel of the Woodmen Of The World Life Insurance Society, and asked him if he would let me use his library, and he very kindly consented to let me do so.

949 Q. What has been the nature of your acquaintanceship and relationship with Mr. Bradshaw since you first met him?

A. Well, I didn't see Mr. Bradshaw from that time up until the time that I went to work for Radio Station WOW, and since that time it has been of the best; in fact, he has been very kind to me at all times—more than kind.

950 Q. You feel that Mr. Bradshaw has made possible your success in the radio business?

A. I believe that Mr. Bradshaw and the other executive officers of the Woodmen Of The World Life Insurance Society have made my success possible, yes.

951 Q. Which one of those officers has, in your opinion, been more responsible for your success?

A. Well, I received a great deal of training under Mr. Orson Stiles, when I first went there in 1928, who was then general sales manager, I believe, of the Society and also a director of the station, and then when Mr. Ruess took over the station as director of personnel, and received an abundance of training under his very kind instructions, [fol. 242] and Mr. Wells and Mr. Newberry have all been most kind.

952 Q. By whom were you employed first by the company?

A. I was employed by Mr. Orson Stiles. I would like to state that Mr. Pakes, the assistant secretary of the com-

pany, introduced me to Mr. Stiles and was responsible for my appointment with Mr. Stiles.

953 Q. Did Mr. Bradshaw assist you in securing a loan with which to buy your stock in the new company?

A. No, sir.

954 Q. You heard Mr. Bradshaw state that he had some conversation with the bank concerning a loan to you?

Mr. Crossman: Just a minute. You heard Mr. Bradshaw state — in this trial?

Mr. Stewart: I didn't say in this trial.

Mr. Crossman: I am inquiring, and I object to the competency of this question unless counsel designates where and when he stated it in the presence of this witness. I know nothing about that.

955 Q. (Continuing): That is when Mr. Bradshaw's and your deposition was taken several months ago.

Mr. Crossman: And I object to it because it is not a matter of evidence in this court; Mr. Bradshaw's deposition is not here.

The Court: I think we could proceed in an orderly way about that. I think you should not prove this in that manner.

[fol. 243] 956 Q. You know nothing, so far as you are concerned, about Mr. Bradshaw having had anything to do with any loan?

A. Well, he may have talked to the bank. I do not know. But I secured the loan with, I believe, the proper amount of security. At least the bank believed it was the proper amount of security.

957 Q. At what bank?

A. The Omaha National Bank.

958 Q. And Mr. Bradshaw is a director of that bank?

A. Yes. I know a lot of men that are directors of that bank.

959 Q. Well, I didn't ask you that.

A. Well, I just want you to know that he is not the only director of the Omaha National Bank.

960 Mr. Crossman: The defendant Society and the individual officers offer in evidence Exhibit 13, which is a true copy of the lease on the radio station. It is admitted in the pleadings.

Mr. Stewart: No objection.

The Court: Received.

961 Mr. Crossman: Exhibit 13, which I shall read to your Honor in just a moment, refers to another instrument as having been concurrently executed, and being, in fact, a part of the whole general transaction (excepting certain rental space in the Insurance Building, Omaha, Nebraska described in a separate lease entered into between the parties hereto simultaneously herewith).

[fols. 244-245] 962 Mr. Crossman: The other instrument, Exhibit 14, which is a true copy, a copy of which Mr. Stewart has had for two weeks or more, we also offer in evidence.

The Court: Is that the original?

Mr. Crossman: No. It is a true copy.

Mr. Stewart: It is all right. Put it in as far as I am concerned.

The Court: Both will be received.

Exhibits 13 and 14 were received and read in evidence, form a part hereof, and are in the words and figures following.

[fol. 245a] EXHIBIT "14"

Insurance Building

This Indenture, Witnesseth That Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society, a Corporation organized and existing under the laws of the State of Nebraska, hereinafter called the Lessor, does hereby lease to Radio Station WOW Incorporated, hereinafter called the Lessee, Storage Rooms 4, 5, 6, 7 in basement; Store room numbered 1712 Farnam; Room Number 256-7-8-9-60-1-2-3-4-5-7-8-9-72-3-7-8-9-80-1-2-3-4-5-6-8; 222-3-6-7-30-1; Storage Room 19 and balcony space on the second floor of the building known as Insurance Building, located on the northwest corner of Seventeenth and Farnam Streets, and situated on Lots Seven (7) and Eight (8), Block One Hundred Sixteen (116), City of Omaha, Douglas County, Nebraska, as surveyed and lithographed, which leased premises are more particularly described and delineated by being enclosed in red lines and marked "Exhibits A," "B" and "C" on plat attached hereto and made a part hereof, to be used and occupied by said lessee as Radio Station and for no other purpose,

for the term of Fifteen (15) Years to commence on the 1st day of November, 1942, and to terminate on the 31st day of October, 1957, unless sooner terminated as hereinafter provided.

In consideration of the foregoing demise and the agreements herein contained, the lessee does hereby covenant to accept the said lease, to perform the agreements hereby imposed, and to pay the lessor rent for said premises as follows:

~~for the period beginning on the 1st day of November,~~ 1942, and ending on the 31st day of October, 1957, Two Thousand One Hundred Seventeen Dollars & Twenty-three Cents ($2,117.23) per month,

lawful money of the United States, payable monthly, in advance, on the first day of every calendar month during the said term, at the office of Walter C. Johnson Co., Agent, or such other place in Omaha as the lessor in writing may direct.

(1) It is understood and agreed that for the rent mentioned, the lessor shall furnish janitor service, steam heat, water, air conditioning, and elevator service during hours the station is operating and in the manner customary in the building. It is agreed that at the option of the lessor the lessee shall purchase electricity and power from the lessor, for which electricity and power the lessee agrees to pay monthly at the end of each month the usual rate charged in the building, which shall not exceed the rate charged for similar services by public service companies in Omaha, Nebraska. It is further understood and agreed that any charges, payments or expenses, that the lessor may be obliged to pay by reason of the failure of the lessee to pay the same, pursuant to the terms and conditions of this lease, and any sum or sums becoming due to the lessor pursuant to the provisions hereof, shall be and become additional rental and become due and payable on the rental day next following such payment or accrual of such charge or expense. It is further understood and agreed that the lessor shall have the right to discontinue any service above mentioned or any part thereof whenever and during any period for which bills for rent, electric current, or other service are not promptly paid by the lessee. It is also understood and agreed that the lessor shall not be liable

for damages nor shall the rental hereinbefore stipulated be abated, for failure to furnish, or delay in furnishing any service above mentioned, or any part thereof as aforesaid, when such failure to furnish, or delay in furnishing, is occasioned by needful repairs, renewals or improvements, or in whole or in part by any strike or labor controversy, or by any accident or casualty whatsoever, or by any act or default of the lessee or other parties, or by any unauthorized act or default of any employee of the lessor, nor for any other cause or causes beyond the reasonable control of the lessor.

(2) It is understood and agreed that the said lessee shall not assign this lease, nor let nor underlet said premises, or any part thereof, nor use the same or permit the same to be used for any other purpose than as above described, nor permit any change in occupation, nor transfer of this lease by operation of law or otherwise, nor display any "for rent" signs upon said premises without written consent of the lessor first obtained, but such consent shall not be arbitrarily nor unreasonably withheld. It is further understood and agreed that in the event the lessee desires to sell, transfer, assign or otherwise dispose of this lease and that the lessor is willing to consent to said assignment, then the proceeds from the disposition of this lease by the lessee over and above the rental stipulated herein after a deduction is made for the actual expenses incurred by the lessee in disposing of this lease, shall be divided equally between the lessor and the lessee.

(3) It is covenanted and agreed that the said lessee shall not make any alterations or additions in said premises without written consent of the lessor first obtained, and that all additions, fixtures or improvements which may be made by the lessee to said premises, except movable office furniture and fixtures, shall be the property of the lessor, and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease by lapse of time or otherwise.

* * * * * * *

(5) It is understood and agreed that no promises, representations, or agreements, except such as are embodied herein or endorsed hereon, have been made with or to the lessee respecting the condition of said premises, or the

manner of operating said building or the making at the cost of the lessor of repairs in said premises; and the taking possession of said premises by the lessee shall be conclusive evidence as against the lessee that said premises were in good and satisfactory condition when possession of the same was so taken, and the lessee will, at the termination of this lease by lapse of time or otherwise, return said premises to the lessor in as good condition as when received, loss by fire and ordinary wear excepted, and will promptly remove all the lessee's property therefrom.

(6) It is understood and agreed that all personal property in the demised premises shall be at the risk of the lessee only, and the lessor shall not be liable for any damage to said personal property, to said premises or said lessee, or to other persons or property, caused by water, steam, sewerage, gas or odors, or by any act or neglect of other tenants, occupants, or the employees of the building, or any other person, or caused in any other manner whatsoever.

[fol. 245b] (7) It is understood and agreed that the lessor, its agents or representatives shall have the right to enter said premises at all reasonable times to examine or exhibit the same, to do any work therein deemed necessary for the purpose of strengthening columns to bear additional stories, or to make such repairs, additions or alterations as it may deem advisable for the safety, improvement and preservation thereof, or of said building; and at any time within two months before the expiration of this lease, to put and keep upon the door or window of said premises a notice "for rent"; and the lessor shall have the right to change the name of the building, to change the location of its entrance and lobby, to change, remodel, alter or improve the building or any part thereof at any time, and the lessee expressly waives any and all claims for damages against the lessor resulting therefrom. Upon the vacation of said premises by the lessee at any time prior to the termination of this lease, the lessor shall have the right to enter said premises for the purpose of decorating or making repairs or alterations, without prejudice to any right that it may have under this lease against the lessee for the unexpired term hereunder.

(8) It is understood and agreed that the lessor shall not be liable for any loss or damage that the lessee may sus-

tain by reason of the closing or darkening of any of the windows in the demised premises through the erection of a neighboring building or otherwise.

(9) It is understood and agreed that the rules and regulations in regard to the said building, which are printed on the following pages hereof, and are hereby made a part of this lease, shall, during the continuance of this lease, be in all things observed and performed by the said lessee and the said lessee's employees, agents, subtenants, if any, and any others permitted by the lessee, to enter said premises. It is also understood and agreed that the lessor shall have the right to make such other and further reasonable rules and regulations as, in the judgment of the lessor, may from time to time be needful for the proper heating and cooling of the building, safety, care and cleanliness of the premises and for the preservation of good order therein.

(10) It is understood and agreed that said lessee will not invalidate any policies of insurance now or hereafter made on said building, and that said lessee will pay all extra insurance premium on said building, if any is required, on account of extra risk caused by the lessee's use of the demised premises.

(11) It is understood and agreed, and this lease is made upon these express conditions, that the lessor and the lessor's successors or assigns shall have the right to terminate this lease absolutely at the end of any calendar month by first giving to the lessee, or the lessee's assigns, or by leaving at said demised premises, addressed to the lessee, at least six (6) months before the date of such termination, a written notice of the lessor's intention to remodel, remove or demolish the said building, or to sell, or make a ground lease of, the land thereunder, the rate of rent herein stipulated being the consideration for this agreement.

(12) It is understood and agreed that no waiver of any condition expressed in this lease or of any right of the lessor reserved herein, shall be implied by or from any failure or neglect to declare a forfeiture on account of its violation or by repeated and continued indulgence or conduct on the part of the lessor in forbearance of its rights hereunder, and any violation of the express or necessarily implied terms and conditions hereof which shall be continued or repeated subsequent to such neglect to forfeit, such indul-

gence or other conduct as aforesaid, shall subject the lessee to the provisions herein contained, according to the express intent and purpose thereof.

(13) It is understood and agreed that in case the said premises shall at any time be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be unfit for occupation or use, then the rent hereby reserved, or a fair and just proportion thereof, according to the nature and extent of the damage sustained in loss of occupation of the premises shall be suspended, cease to be payable and so continue until said premises shall be rebuilt or made fit for occupation and use, or if such damage is to the extent of 50 per cent or more, then these presents shall be terminable at the election of the lessor, notice of which election, if exercised, shall be given in writing within 25 days from date of casualty, provided also that in case said premises are totally destroyed, or work to put them in tenantable condition is not commenced within one month from the time of said damage and continued thereafter, with reasonable diligence, then these presents shall be terminable at the election of the lessee, notice of which election, if exercised, must be given in writing within 35 days from date of casualty.

(14) It is understood and agreed that if default shall be made by the lessee in the payment of rental, or any part thereof, when and as herein provided, or in respect to any of the covenants herein, the lessor may discontinue furnishing the service herein provided for, or any part thereof, and shall have the right to re-enter the said premises without any formal notice or demand, and to hold and enjoy the same thenceforth as if these presents had not been made, without prejudice, however, to any right of action or remedy of the said lessor in respect to any breach by the lessee of any of the covenants herein contained, it being expressly provided that all rights and remedies of the lessor under this lease shall be cumulative and none shall be exclusive of any rights and remedies allowed by law.

(15) It is understood and agreed that should the lessee vacate or abandon said premises, or should the leasehold interest be levied on under execution, or should the lessee be declared bankrupt or insolvent or make an assignment for the benefit of creditors, or violate any of the covenants of this lease, or should a receiver be appointed for the

lessee's estate, or this lease become the property of or be possessed or controlled by any receiver or trustee, then and in any such cases, the lessor may, if so desired, without notice to the lessee or any other person at once declare such tenancy terminated. In case the lessor does not elect to take advantage of the rights conferred by the foregoing provisions of this paragraph, if the lessee shall vacate or abandon said premises, or if, after default by lessee in the covenants of this lease, the lessor shall elect to re-enter, whether with or without legal process, the lessor is hereby authorized irrevocably to remove the lessee's signs, and to relet the said premises, if the lessor so desires, or any part thereof, and if the lessor fails thus to realize an actual income from said premises during the entire original term of said lease equal to the rental above reserved, together with the expenses of said releting and altering said premises, and collecting rent therefrom, the lessee agrees to satisfy and pay all deficiency and to make payments for said deficiency each month, as the same may accrue.

(16) It is understood and agreed that, if the lessee shall not promptly remove all his property from said premises whenever the lessor shall become entitled to the possession of said premises as herein agreed, the lessor may, without notice, remove the same, or any of the same, in any manner that the lessor may choose, and the lessee will pay the lessor, on demand, any and all expenses incurred in such removal, and also storage on said effects for any length of time during which the same shall be in the lessor's possession or control, or if the lessee shall at any time vacate or abandon said premises, and leave any goods or chattels in, upon or about the premises, for a period of 10 days after such vacation or abandonmen, or after the termination of this lease in any manner whatsoever, then the lessor shall have the right to sell all or any part of said goods and chattels, upon which it has a lien as herein provided, at public or private sale, without giving any notice to the lessee, or any notice of sale, all notices required by statute or otherwise being hereby expressly waived; and to apply the proceeds of such sale, first to the payment of all costs and expenses of conducting the sale or caring for or storing the goods and chattels; and second, to apply the balance, if any, to any indebtedness due from the lessee to

the lessor; and, third, to deliver any additional surplus, on demand in writing, to the lessee.

(17) It is understood and agreed that all the goods, chattels, fixtures and other personal property belonging to said lessee which are, or may be put into the said leased premises during said term, whether exempt or not from sale under execution and attachment under the laws of the State of Nebraska, shall at all times be bound with a first lien in favor of said lessor, and shall be chargeable for all rent hereunder and the fulfillment of the other covenants and agreements herein contained.

(18) It is understood and agreed that after the service of notice, or the commencement of suit, or after final judgment for possession of said premises, the lessor may receive and collect any rent due, and the payment of said rent shall not waive or affect said notice, said suit or said judgment. It is also understood and agreed that this lease is not to extend beyond the term herein granted, and no holding over, or continuance in the occupancy of the demised premises shall work an extension of said lease; but in any and all such cases the lessee shall be trespasser or tenant at will at the option of the lessor, subject to removal by said lessor by summary process and proceedings, and 30 days' peaceable possession shall not constitute a defense to such proceedings, and the lessee hereby agrees to pay all expenses of the lessor incurred in enforcing any of the provisions hereof; it being provided further that an acceptance of rent by the lessor during such holding over period shall operate to create a tenancy from month to month only, terminable upon 30 days' notice, but this agreement shall not be a waiver by the lessor of any right of re-entry as herein set forth.

. . . . . .

(20) It is understood and agreed that no agreements heretofore or hereafter made shall be held as changing or modifying any of the terms or conditions of this lease unless they are in writing, and signed by both the lessor and the lessee. It is also understood and agreed that the covenants and agreements herein contained shall be binding upon all heirs, executors, administrators, successors and assigns of the lessor and of the lessee.

[fol. 245c] Witness the hands of the parties hereto in triplicate this 14 day of October, 1942.

Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society, Lessor, by De E. Bradshaw, President Radio Station WOW Incorporated, by John J. Gillin, Jr., President, Lessee.

In presence of Farrar Newberry, Secretary, WOW.

Rules and Regulations Referred to Within

1. The lessee shall be liable and accountable for the acts, omissions and errors of his or its agents, employees and visitors, and the term "lessee," as used in these Rules and Regulations, shall be construed to mean the "lessee," his agents, employees and visitors.

2. Safes, furniture, boxes or other bulky articles shall be carried by the freight elevator, or by the stairways, or through the windows of said building, in such a manner and at such hours as may be directed by the lessor. Safes and other heavy articles shall be placed by the lessee in such places only as may be first specified in writing by the lessor, and any damage done to the building by taking a safe in or out, from overloading the floor, or in any other manner, shall be paid for by the lessee causing it.

3. No sign, picture, trademark, advertisement or notice shall be inscribed, printed, affixed or painted on any part of the outside or inside of said building, except of such color, size and style and at such places as shall be designated by the lessor, and the lessor shall have the right to remove any objectionable sign, placard, picture or advertisement without notice and at the expense of the lessee. All signs on glass doors or windows must be painted or executed by the lessor, or someone designated by lessor, and the actual cost paid by the lessee.

4. The lessee shall not put up nor operate any engine, boiler, dynamo, or machinery of any kind, nor carry on any mechanical business in said premises nor place any explosive therein, nor use any kerosene or oils or burning fluids in said premises without first obtaining the written consent of the lessor.

5. The lessee shall use gas or electric light only of such company as may be approved of by the lessor. If the lessee desires telegraphic, telephonic, annunciator or electrical connections, the lessor will direct the electricians as to where and how the wires are to be introduced, and without such written directions no boring or cutting for wires will be permitted, and the cost of such work shall be paid for by the lessee.

6. The leased premises shall not be used for the purpose of lodging or sleeping rooms, nor for any immoral or illegal purpose, nor in any way to damage the reputation of the building; and the lessee shall not disturb nor permit the disturbance of other tenants, by the use of musical instruments, radios, or any unseemly noises, nor by any interference whatever; and in the use of said premises, the lessee agrees that nothing shall be done or permitted therein, contrary to, or in violation of, any law or laws of the United States of America, the State of Nebraska, or any ordinance or ordinances of the City of Omaha, or any requirements of the police and health departments of the City of Omaha; and that nothing shall be placed or permitted upon the outside window sills or thrown from the windows of the building.

7. No person or persons, other than the employees of the building, shall be employed by the lessee for the purpose of cleaning or of taking care of said premises without the written consent of the lessor. Any person or persons so employed by the lessee (with the written consent of the lessor) must be subject to and under the control and direction of the manager of the building in all things in the building and outside of said leased premises. The lessee shall furnish sufficient light and electric current for the janitors employed by the lessor to properly perform their duties in said leased premises. The lessor, its agents and employees of said building shall at all times keep a pass key and be allowed admittance to said leased premises to cover any emergency of fire or required examination that may arise.

8. The entrances, corridors, passages, stairways and elevators shall be under the exclusive control of the lessor and shall not be obstructed, or used by the lessee for any other purpose than ingress or egress to and from the leased

premises; and the lessor shall have the right to control ingress and egress to and from said building at all times.

9. The lessor shall have the right to exclude or eject from the buildings animals and birds of every kind, bicycles and all canvassers and other persons who conduct themselves in such a manner as to be, in the judgment of the lessor, an annoyance to the tenants or a detriment to the building.

10. Such painting or calcimining, if any, as may be agreed to be done at the expense of the lessor, shall be done in regular hours, or if the lessee desires the work done on Sundays, holidays or overtime, the lessee shall pay for the extra cost.

11. No additional locks shall be placed upon any doors of said premises, without first obtaining the written consent of the lessor, and the lessee will not permit any duplicate keys to be made (all necessary keys to be furnished by the lessor), but if more than two keys for any door are desired, the additional number shall be paid for by the lessee. Upon termination of this lease the lessee shall surrender all keys of said premises and of said building, and shall give to the lessor the explanation of the combination of all locks on the doors of the vaults and safes.

12. The lessee, before closing and leaving the said premises at any time, shall see that all awnings are pulled up and all windows closed, thus avoiding possible damage from fire, storms, rain or freezing.

13. The lessee shall not misuse or deface the premises or any part thereof by driving nails, installing equipment or attachments which requires screwing or boring, or by overloading the electrical circuits, disposing of refuse through plumbing fixtures, wedging back faucets so as to waste water, pasting of pictures or bulletins upon painted or varnished surfaces, or abusing, defacing or marring the premises and appurte... thereto in any other manner whatsoever.

14. Tenants are requested not to give gratuities or fees to employees of the building.

15. To insure efficient air conditioning the lessee shall keep the window shades drawn half way when exposed

to the direct rays of the sun and the windows and corridor doors closed at all times.

Guarantee

In consideration of the execution of the within lease by the lessor at —— request and on the faith of this guarantee —— hereby guarantee the payment of the rent and the performance of all the covenants of the lessee herein to the said lessor, and —— will pay all the lessor's expenses, including attorney's fees, incurred in enforcing the obligations of the lessee or incurred in enforcing this guarantee.

Witness —— hand at the date of the within lease.

In presence of —— ——.

	Area	Mo. Rent	Rate
1712 Farnam St.	917 Sq. ft.	$250.00	$3.27
Balcony	1827 Sq. ft.	286.23	1.88
231	2374 Sq. ft.	356.10	1.80
280	4500 Sq. ft.	1181.25	3.15
Storage #19	152	12.65	1.00
Basement Storage		31.00	
	9770	$2117.23	

Plus electricity used charged for at the same rate as Nebraska Power Company.

[fol. 245d] Assignment and Acceptance

For value received, the lessee hereby assigns all right, title and interest in and to the within lease, from and after —— ——, 19—, unto —— —— heirs, executors, administrators, successors and assigns, and in consideration of the lessor's consent to this assignment, guarantees the performance by said —— —— of all the covenants on the part of the lessee in within lease.

Dated this —— day of —— ——, 19—.

In consideration of the above assignment, and the written consent of the lessor hereto, the undersigned hereby assumes and agrees to make all the payments from and after —— ——, 19 —, and to perform all of the covenants and conditions of the within lease to be made and performed.

Dated this —— —— day of —— ——, 19—.

—— ——.

Consent to Assignment

Sovereign Camp of the Woodmen of the World or/and Pacific Woodmen Life Association,

Lessor, hereby consents to the assignment of the within lease to —— —— on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the lessee as contained in the within lease, and that no further assignment of said lease or subletting of the premises, or any part thereof, shall be made without the written consent of the lessor first had thereto.

Sovereign Camp of the Woodmen of the World or/and Pacific Woodmen Life Association, by —— ——

Insurance Building Lease

Woodmen of the World Life Insurance Society and/or Omaha Woodmen Life Insurance Society to —— ——. No. 4-5-6-7 in basement; 1712 Farnam; 256-265; 267-69; 272-3; Room 277-88; 222-3; 226-7; 230-1. Storage Room 19 and Balcony Space on Second Floor. From November 1, 1942 to October 31, 1957.

[fol. 246] 963 Mr. Crossman: I should like to read this lease. In fact, this is what the lawsuit is about. This is the first opportunity you have had to hear what this lease was, except very touchy excerpts of it. And when I have read it, then I want to inquire of Mr. Gillin, as part of his cross-examination, concerning it.

This lease is dated October, 1942, the same date as the Articles of Incorporation of Radio Station WOW, Inc.

Cross-examination.

By Mr. Crossman:

964 Q. Now, Mr. Gillin, the lease, Exhibit 13, says in Paragraph 1 that a detailed inventory of the personal property was to be made up and initialed so as to detail each and every item of personal property. Has that been done?

A. Yes, sir.

965 Q. And have copies of it passed to both of the parties to this lease?

A. Yes, sir.

966 Q. The lease, Exhibit 13, in Paragraph 1, also says that the Society was to transfer all of its contracts with the National Broadcasting Company and other commercial accounts. Has that been done?

A. Yes, sir.

967 Q. The lease, Exhibit 13, in Paragraph 2, says that [fol. 247] it shall become effective and commence when the Federal Communications Commission grants a license to operate to the lessee. Has that been done?

A. Yes, sir.

968 Q. When was it done?

A. At 11:00 P. M.—it took effect at 11:00 P. M., January 14, 1943.

969 Q. And is that the exact hour and minute at which the lessee took over this station?

A. Yes, sir, at 11:00 P. M. Eastern War Time; 10:00 P. M. Central War Time.

970 Q. That is Washington time?

A. That is right.

971 Q. That is because of the Federal Communications Commission being in Washington?

A. That is right, sir.

972 Q. Now, Exhibit 13, the lease, Paragraph 3, refers to the obligation upon the lessee not only to maintain the present property which you lease, but to purchase and install at your own expense all other property or equipment required by the Government, and then this very interesting clause: "And to supply and maintain said station with all the necessary improved machinery and devices for the carrying on of the radio business as it now exists, or it it may hereafter be improved."

A. That is right, sir.

[fol. 248] 973 Q. Now, may I inquire of you now whether or not there is any change in the offing with reference to the improvement of the radio business which may in the entire period of this lease require the installation of additional equipment?

Mr. Stewart: That is objected to as incompetent, not cross-examination, not gone into in the examination in chief of this witness, and constituting a matter of defense.

Mr. Crossman: My answer to that is that Mr. Stewart has pecked at clauses of it all the way through, and therefore I offered the lease in evidence as part of the transaction.

He inquired about part of it, but did not put it in, and I put it in. It seems to me I have a right to inquire about anything that is in the lease, but I will take it on cross-examination or take it on direct examination, I don't care.

Mr. Stewart: That certainly is a part of your defense.

Mr. Crossman: Whether it is a part of my defense, you have been spending your whole case on our defense, including the lease.

The Court: I think he may go ahead.

Mr. Stewart: Well, I want to add to that, it is speculative and uncertain.

Mr. Crossman: I will withdraw the entire question.

974 Q. Mr. Gillin, is there such a thing in radio as television?

[fol. 249] A. Yes, sir.

975 Q Is there a color television?

A. Color television?

976 Q. Is there color television?

A. Color television today is in the laboratory; it will be brought out when it is practical.

977 Q. Where this lease puts the obligation upon your corporation and you and your associates to supply and maintain said station with all the necessary improved machinery and devices for the carrying of a radio business as it now exists or it may hereafter be improved, would the improvement within the meaning of this lease include color television?

Mr. Stewart: That is objected to as calling for a conclusion of the witness, and not cross-examination.

A. Yes, sir.

Mr. Crossman: I am inquiring about the lease.

Mr. Stewart: Your Honor please, I asked him nothing about the provisions of the lease that related to future changes in the station. Now, because I asked him whether there was a provision in the lease that Mr. Bradshaw submitted that related to good-will does not open up everything in the defense of this case for them to go into on cross-examination, it does not seem to me.

Mr. Crossman: Mr. Stewart, you went far beyond asking Mr. Gillin about the lease that Mr. Bradshaw presented. You asked him about that, and then you asked him about [fol. 250] this specific lease, and then you pecked through

eight or ten of the paragraphs, and I have a right to inquire about anything in the lease.

Mr. Stewart: I don't agree with your statement.

Mr. Crossman: Well, that is the ordinary rules of evidence, but whatever the Judge says will be all right with me.

The Court: I think you may answer.

978 Q. You may answer.

A. Yes, sir, it would.

979 Q. I will ask you this, in order to enable the station which you leased to furnish color television would you have to install new and additional equipment?

A. We would have to install—(interrupted)

The Court: I think you are going pretty far.

Mr. Crossman: Very well. Take that up as a part of our direct examination.

980 Q. Mr. Gillin, the lease, Exhibit 13, Paragraph 4, provides for the assumption of payment of taxes. I judge there has been no taxing period since the effective date of the lease?

A. No, there has been no taxing period unless they push through the pay-as-you-go plan, which, of course, will come.

981 Q. Which is not yet a fact?

A. That is right, sir.

982 Q. Paragraph 5 relates to insurance, and separate additional statement of policies?

[fol. 251] A. Yes.

983 Q. Have they been prepared and done?

A. Yes, sir, all the insurance.

984 Q. Has the insurance been fixed as the interest of the parties may appear, and is all that insurance in full force and effect?

A. Yes, sir, all the insurance policies which the Woodmen of the The World Life Insurance Society had on the radio station, including the radio station and its employees, were taken over on January 14th, at 11:00 P. M. Eastern War Time, by Radio Station WOW, Inc., and the premiums have been paid for by the new company since that time, and we have agreed, of course, in the lease to take those insurance policies and pay them up during the period of this lease.

985 Q. Now, Exhibit 13, the lease, Paragraph 7, refers to the exclusion of the A. S. C. A. P. suit. Will you explain

briefly to Judge Rine what that was, and I think it is reasonable for him to know why it was excluded?

A. The A. S. C. A. P. suit, your Honor, was brought about because of the Nebraska law outlawing the A. S. C. A. P., the American Society of Composers, Authors and Publishers, from this state unless they conform to the laws of this state. The A. S. C. A. P. took the law to court, tried to prove its unconstitutionality. During the period that that case was in court, from the Federal Court here in Omaha to the Supreme Court of the United States, where it was held constitutional, the Nebraska state law as to A. S. C. A. P. was held constitutional by the Supreme Court, [fol. 252] Radio Station WOW paid into A. S. C. A. P., that is, after the law became effective in 1937 up until the decision of the Supreme Court, which, I believe, was handed down in 1941—am I right, Judge?

986 Mr. Wells: '42.

The Witness: 1941?

A. (Continuing) —1941, and WOW paid into A. S. C. A. P., without using one single piece of its music, a total amount, which, if triple damages were assessed by the District Court here in Omaha in this action would amount to $278,000, I believe. That action was brought before this particular lease was made, and all actions here in court or otherwise happened before January 14th, 11:00 P. M. Eastern War Time, naturally belonged to the Society, and the Society was the one who paid the money into A. S. C. A. P., and now they are trying to get it back from A. S. C. A. P., and also damages.

987 Q. In other words, your corporation neither has nor takes any interest in that litigation or the proceeds of it?

A. No, sir.

988 Q. Under any circumstances or conditions?

A. No, sir.

989 Q. That is reserved to the Society?

A. Yes, sir.

990 Q. Now, in Exhibit 13, Paragraph 9, is a provision with reference to salary, is that correct?

A. Yes, sir.

991 Q. If there is a default nobody can draw more than [fol. 253] $250.00 a month?

A. Yes, sir.

992 Q. And that would include you, Mr. Gillin?

A. That is right, yes, sir. I approved it. Mr. Bradshaw and Judge Wells wanted that in the contract, and I approved it.

993 Q. Exhibit 13, the lease, Paragraph 10, provides that all funds received by your lessee corporation shall be deposited in a bank selected by mutual agreement. Has that bank been selected?

A. Yes, sir.

994 Q. What bank is it?

A. That bank up to this time is the Omaha National Bank.

995 Q. Now, Exhibit 13, the lease, in Paragraph 11, apparently provides that the Society can at any reasonable time, or at least once a month, can give you an audit, can it not?

A. Yes, sir.

996 Q. And see each and every record you've got?

A. Yes, sir.

997 Q. Of disbursements and receipts, salaries?

A. Yes, sir.

998 Q. And supporting data and justification for every expense that you claim?

A. Yes, sir.

999 Q. The lease, Exhibit 13, Paragraph 12, contains the usual provision in the event of default that they can take over and take back the entire property, is that right?

[fol. 254] A. That is right.

1000 Q. In the event of default, recapture it all?

A. Yes, sir.

1001 Q. The lease, Exhibit 13, Paragraph 13, provides what shall happen in the event of the destruction of the property in part or in whole. I won't go into that. There is one provision that I want to explain. Now, Exhibit 13, again, Mr. Gillin, Paragraph 6, appears to be a turn-back clause at the end of fifteen years. It appears after completing this lease you turn back not only the property that you have leased, but any additional replacement or renewal that you put in the property, is that right?

A. That is right, sir.

1002 Q. Which would include, without going into detail, television, if you install it?

A. That is right.

1003 Q. Without any payment for the television equipment?

A. We would maybe have to install it because of the Federal rules in about the thirteenth year, maybe, and only have the use of the equipment for two years, we would still have to turn it back.

1004 Q. But it goes back into the Society?

A. It goes back to the Society at the end of fifteen years.

1005 Q. Without them paying you a dime for it, is that right?

A. Yes, sir.

1006 Q. Now, Exhibit 13, the lease, on the radio station, [fol. 255] refers in the introductory clause to another lease.

A. Yes, sir.

1007 Q. And that, we agree, is this Exhibit 14. You are familiar with that?

A. Yes, sir.

1008 Q. Exhibit 14 apparently is a lease from the Society to your new corporation for space in the Insurance Building, is that right?

A. That is right, sir.

1009 Q. For fifteen years at $2,117.23 a month, is that right?

A. That is right.

1010 Q. Which is in addition to the $8,166.00 per month for three years, and $5,680 a month for twelve years for the radio station?

A. Yes.

1011 Q. Now, what connection was there, if any, in entering into the lease of the radio station as regards the lease of this space in the building; could you have done one without the other?

A. No, sir, except that we could have moved the studio to some other building, but one of the contingencies, of course, of the lease agreement of the station was that we would have to lease the space in the building that we now occupy.

1012 Q. Could you have leased this radio station and moved it out into some other place under the proposal that was before you?

A. No, sir.

1013 Q. They went together, didn't they?

A. They went together, and this leasing of the property [fol. 256] requires a rental to the Insurance Building, a

total in fifteen years of $450,000 in rent that we pay to the Society.

1014 Q. I have not got a pencil out, but what is the total rent from your corporation to the Woodmen under this lease over the period of years? I have not computed it.

A. Well, on the basis of four per cent interest it is $855,000, I believe; on a three percent basis $910,000.

1015 The Court: You are going pretty far on cross-examination.

1016 Mr. Crossman: Well, I will stop now.

1017 The Court: I think you can put that in yourself.

1018 Mr. Crossman: Very well. I will hold that and go on with the cross-examination.

1019 The Court: Yes.

1020 Mr. Crossman: It is proper for me to inquire into the matter of good-will that is found in the lease.

1021 The Court: If it relates to the sale.

1022 Q. Mr. Gillin, were you present this morning when I read the allegations from Paragraph 9 of the plaintiff's petition, that in fact you were acting for Mr. Bradshaw as his assistant to make a secret profit out of this transaction; were you here?

A. I didn't arrive, sir, until around 11:15.

1023 Q. Let me read it.

1024 Mr. Crossman: The reason I inquire about that is that Mr. Stewart went into detail about Mr. Gillin's stockholdings. Now, if you think it is improper for me to go into [fol. 257] that, I will not.

1025 The Court: You mean in detail with Mr. Gillin about his stock?

1026 Mr. Crossman: About his stockholdings in the company.

1027 The Court: Well, anything he asked him about.

1028 Mr. Crossman: I want to inquire whether he owns the stock or somebody else does.

1029 Q. Mr. Gillin, in connection with the inquiry that Mr. Stewart made of you about your stockholdings, the issues in this case as charged by the petition, Paragraph 9, is that the individual defendants, that is, Mr. Bradshaw, Mr. Patterson, Mr. Newberry, Mr. Ruess, Mr. Braden, Mr. Miller and Mr. Holston, in violation of their duties as officers of the

Society and the trust reposed in them as said officers devised a plan to unlawfully procure for the benefit and profit of themselves and their friends and associates the possession and control of the radio station for a grossly inadequate consideration. Now, with that as a preliminary, I want to inquire of you whether or not any of these seven men named, their families, their associates or anybody else has any interest whatsoever in the capital stock which you have in this corporation or any lien upon it or any right to earnings, in writing, oral, secret or open or otherwise?

A. No, sir, they have no interest.

1030 Q. Are you the sole owner?

[fol. 258] A. I am the sole owner.

1031 Q. Do you have any agreement to participate merely as a titleholder in a conspiracy, the like of which is charged in this petition?

A. I am the sole owner of the stock and there is no foundation for it whatsoever.

1032 Q. Did you ever hear of such a thing until this petition was filed?

A. No, sir; no, sir.

1033 Q. Is it a fact, is the charge in the petition a fact?

A. No, it is not a fact; no, it is not a fact.

1034 Q. Now there was a very strong inference thrown out, Mr. Gillin, by my friend Mr. Stewart about the fact that Mr. Bradshaw helped you get a loan at the Omaha National Bank to buy this stock. I say it is an inference. What is the fact as to who borrowed that money?

A. I just went over and talked to Mr. Dale Clark personally about it, and he asked me to bring in any security which I may have. I brought in the security and he turned me over to Mr. Davis, and Mr. Davis looked it over, and Mr. Albus in the department of insurance at the bank looked all over my insurance too, and that insurance was accepted as securing the amount of money that I borrowed from the Omaha National Bank.

1035 Q. Your life insurance?

A. My life insurance.

1036 Q. In other words, you have pledged your own life insurance?

[fol. 259] A. That is right.

1037 Q. To your loan?

A. To my loan.

1038 Q. To secure the money to buy this stock?

A. That is right, sir.

1039 Q. Is Mr. Bradshaw or any one of these six individuals on your note as either a joint maker or surety or guarantor?

A. No, sir.

1040 Q. In no way whatever?

A. No, sir.

1041 Q. And the collateral is your collateral?

A. The collateral is my collateral. In fact, I took out another insurance policy, $11,000, in case something should happen to me, that my family would be the recipient of the amount of money that would ordinarily come to them from the insurance that I had pledged against the stock.

1042 Q. Mr. Bradshaw had nothing to do with that, did he?

A. No.

1043 Q. Now, another inference was cast, Mr. Gillin, about your consulting with Breed, Abbott & Morgan.

A. Yes, sir.

1044 Q. The attorneys in New York. Had you ever consulted Breed, Abbott & Morgan as attorneys prior to the time of the proposed incorporation of Radio Station WOW and this lease?

A. No, sir.

1045 Q. Did you even know the firm?

[fol. 260] A. I knew of the firm, yes.

1046 Q. But had you ever employed them professionally?

A. No, sir.

1047 Q. Well, now, so that we won't have any misunderstanding about that, will you state generally how you happened to confer with them, with whom you conferred, and what you conferred about?

A. When I first went to New York I saw Mr. Niles Trammell, president of the National Broadcasting Company, about the possibility of loaning me some money from the National Broadcasting Company, with whom we are affiliated, we have a contract that runs until 1946, I discussed with him the possibility, if we purchased the station, the possibility of getting the money and being able to pay back the incorporators for the money over a period of time.

Mr. Stewart: I object to that as not being responsive to the question, and not cross-examination.

The Court: I don't think the answer is responsive to a proper question.

1048 Q. Is this preliminary?

A. Preliminary.

1049 Q. The reason for which you consulted Breed, Abbott & Morgan?

A. Yes, sir.

1050 The Court: He cannot tell his whole case here.

1051 Mr. Crossman: No. That is right.

1052 Q. Did you consult Breed, Abbott & Morgan?

A. Yes, sir, I consulted Breed and Abbott.

[fol. 261] 1053 Q. And what member of the firm?

A. Mr. Payton.

1054 Q. And did you hear Mr. Guy Myers testify this morning; were you in the court room?

A. No, sir.

1055 Q. Where did you have your preliminary conversation with Mr. Payton?

A. The preliminary conversation we had with Mr. Payton—let's see now. The preliminary conversation was in Mr. Payton's office; I went to Mr. Payton's office, and then the next day after I had given Mr. Payton the background of the type of a lease we wanted and so forth, and also had turned over to him the lease which had been handed to me by Mr. Bradshaw, we went into Mr. Guy Myers' office at 35 Broad Street and discussed the matter with two other members of the firm of Breed, Abbott & Morgan for, I would say, at least three or four hours. Now, Mr. Myers was not in on that conference. He was called to another conference which he attended. But the first meeting that I had with Mr. Payton was in the office of Breed, Abbott & Morgan. The next day we went with Mr. Guy Myers, and Mr. Guy Myers had to leave the meeting and was not there for over, I think, about half an hour at the meeting.

1056 Q. That consultation was with reference to the proposed lease, was it?

A. Yes, sir.

1057 Q. Had they ever represented you professionally before?

[fol. 262] A. No, sir.

1058 Q. Or since?

A. No, sir.

1059 Q. Then you testified, I believe, that Mr. Massey became and was at all times your local attorney in connection with this entire matter?

A. Yes, sir.

1060 Mr. Crossman: Judge, I expect that is as far as I can go today.

1061 The Court: Mr. Matthews was not your attorney then?

The Witness: Mr. Matthews was the attorney for the corporation.

1062 The Court: I mean not your personal attorney?

The Witness: No. My personal attorney is Mr. Paul Massey, Judge.

1063 The Court: And the only one?

The Witness: I have known him since (interrupted)

1064 The Court: I say "and the only one"?

The Witness: And the only one, yes, sir.

(At 5:05 o'clock P. M., March 2, 1943, Court adjourned until 9:30 o'clock A. M., March 3, 1943.)

[fol. 263] 9:30 A. M. March 3, 1943.

Court convened pursuant to adjournment, same parties present as before, and the following proceedings were had:

JOHN J. GILLIN, JR., recalled for Cross-examination, testified as follows:

Mr. Crossman: I am going to restrict this cross-examination because there are a number of matters I am clear should be taken up on direct when we make him our witness.

By Mr. Crossman:

1065 Q. When we adjourned last evening, Mr. Gillin, I was examining you with reference to Exhibit 13 which is the lease of the radio station itself. I should like to ask you a further question or two concerning that. In paragraph 1 on page 2 where reference is made to the rental to be paid, the $8166.00 per month, has the proportionate share of that rental been paid for the month of January, 1943?

A. Yes, sir.

1066 Q. And has the whole of it been paid for February, 1943?

A. It has been done.

1067. Q. Those payments have been made for the Radio Station WOW?

A. It has been done, yes.

1068 Q. Now, referring to Exhibit 14 which is the lease on the space occupied by the lessee corporation in the Insurance Building, Exhibit 14 provides for a monthly rental of $2117.23 under the lease Exhibit 14 for that space: has the proportionate rental been paid for the month of January, 1943?

A. Yes, sir.

1069 Q. Has all of it been paid for the month of February, 1943?

[fol. 264] A. Yes, sir.

1070 Q. And has all of it been paid for the month of March, 1943?

A. It has been done.

Mr. Crossman: That is all.

Re-direct examination.

By Mr. Stewart:

1071 Q. Mr. Gillin, was there more than one draft of the lease of the station prepared?

A. The first draft was handed to me, of course, by Mr. Bradshaw—that is, the type of lease he desired.

1072 Q. About when was that, Mr. Gillin?

A. Oh, that was, I think, sometime about September.

1073 Q. About when in September, to the best of your recollection?

A. Well, the forepart, because I was down to New York with it.

1074 Q. When did you go to New York?

A. I think I went down to New York immediately after a Board meeting in Chicago which was around the 15th of September.

1075 Q. And was it immediately after that meeting that Mr. Bradshaw gave you this first draft of the lease?

A. No, before that; before that. I took the lease to New York and went over it with Breed, Abbott and Morgan, Mr. Peyton especially, and two other attorneys of that corporation, and brough it back, went over it with Mr. Massey, my attorney, and then took it over to Mr. Bradshaw.

I told him "this is what we would like to have changed in the lease."

[fol. 265] 1076 Q. Did Breed, Abbott and Morgan prepare a draft of the lease for you?

A. They didn't prepare a draft, but there were certain paragraphs they didn't agree with in what was handed me by Mr. Bradshaw first; in other words, the first was merely a working agreement, what they wanted, and then we had to bring in our objections, you see.

1077 Q. As I understand it, after Mr. Bradshaw submitted a lease to you and you took it to Breed, Abbott and Morgan, they made suggested changes in it but did not rewrite it at that time?

A. They made suggested changes, which was agreed to by Mr. Bradshaw.

1078 Q. About when was it that he agreed to those changes?

A. He agreed to those changes about the latter part of September, because I took it out then to Mr. Clarke Swanson and Mr. Horace Erikson, and they turned the lease down the night before we formed the new corporation on October 3rd, and that is when I called Mr. Isaacson and Mr. Samardick——(interrupted)

1079 Q. Just a minute, John. I want you to just answer the question.

1080 Mr. Stewart: I move to strike all after the words "about the latter part of September" as not responsive to the question. We will get a big record.

1081 The Court: Well, we are basing his testimony as to the time on things that are called to his attention; if he makes a speech that doesn't make any difference; this doesn't make a big record.

[fol. 266] 1082 Q. Do you have the lease with you that Mr. Brashaw first drafted and submitted to you?

A. No, I don't.

1083 Q. Where is it?

A. I don't think I have it any more. I can try to find it.

1084 Q. What did you do with it?

A. Well, frankly, I had so many papers concerning this corporation in one file that I destroyed those I didn't need as we went along. We agreed upon a new lease—why, I didn't keep it—I am quite sure I didn't.

1085 Q. Did you keep the suggestions that were made by Breed, Abbott and Morgan as to the changes which were to be made in the lease Mr. Bradshaw submitted to you?

A. The suggestions that were made by Breed, Abbott and Morgan were contained in a lease agreement which they took—just took the lease agreement Mr. Bradshaw handed me, and went ahead and drew it, what they thought, including the ones Mr. Bradshaw had, of course, that they accepted of Mr. Bradshaw's lease. That is the one I brought back to Mr. Bradshaw.

1086 Q. Oh, then Breed, Abbott and Morgan prepared a new lease?

A. They didn't prepare a new lease, as the lease goes, but the basic form of the lease, you might say, was drawn up by Mr. Bradshaw. That we had referred to Breed, Abbott and Morgan, and they thought we should have some protective clauses in the new lease, and they asked for those protective clauses, and Mr. Bradshaw agreed to certain ones of them.

[fol. 267] 1087 Q. Well, they prepared an entire lease and you gave it to Mr. Bradshaw?

A. They didn't prepare an entire lease, they put certain clauses in the lease Mr. Bradshaw had drawn.

1088 Q. Do you have the lease Breed, Abbott and Morgan prepared?

A. No, I have the final lease, the one submitted by Mr. Crossman yesterday.

1089 Q. Where is the one Breed, Abbott and Morgan prepared?

A. I haven't got it.

1090 Q. That has been destroyed by you?

A. I think it has. I have got everything pertaining to the station as it is now.

1091 Mr. Wells: He has told you Breed, Abbott and Morgan didn't draw up a lease, they only drew up certain provisions of the lease. He keeps asking about the lease they drew up when they didn't draw any other.

1092 Q. Well, do you have the provisions of the lease that Breed, Abbott and Morgan drew up?

A. No; they are included in this lease.

1093 Q. That is "this lease"—you mean the one finally signed?

A. The one finally signed, yes, sir.

1094 Q. Now, as I understand it, the Directors voted you the 250 shares of Preferred B Stock at a price of a dollar a share because of your work in securing the lease of the station for the new company?

A. Yes, sir. Also so that I would have a voice in the operation of the new corporation.

[fol. 268] 1095 Q. And that B Stock cost you a dollar a share as I understand it?

A. The B Stock, the Preferred Stock Cost me one dollar a share.

1096 Q. And what rate of dividend does that bear?

A. The rate of dividend?

1097 Q. Yes.

A. It will bear the same rate of dividend as the other stock, the common stock, which I paid one dollar a share for; the common stock will bear a dividend of $7.00 a share if the dividend is paid this year.

1098 Q. Do you mean the common or preferred?

A. I think it is either common or preferred. Could I read the By-Laws and tell you?

1099 Q. Surely.

A. "The holders of Preferred Stock shall be entitled to receive out of funds available for dividends, when and as declared by the board of directors, dividends thereon at the rate of Seven Dollars per share per annum, payable quarterly on the last business day of March, June, September and December in each year, such dividends to accrue from the dividend date next preceding the date of issue, or from the date of issue if the date of issue coincides with the dividend date.

1100 Q. Then, if I understand correctly, the Preferred Stock both A and B, bears a dividend of $7.00 a share a year?

A. If the dividend is paid.

1101 Q. And the dividend is cumulative?

[fol. 269] The Court: The dividend is cumulative?

A. No, I don't believe it is cumulative. In other words, you can pay it on December 31st, if you desire to, of any one year, but you would have to pay it in the year.

1102 Q. Turn to the by-law—you just said there—I thought I heard you—that it was cumulative?

Mr. Crossman: It does say cumulative, but he didn't read it.

A. I didn't read anything about cumulative. It might be further down in the paragraph but I didn't read it.

1103 Q. So then, for a share of stock that you paid a dollar for you are entitled to a cumulative dividend of $7.00 a share a year?

A. If the dividend is paid.

1104 Q. And you have 250 shares of that particular kind of stock?

A. I do, Sir.

1105 Q. What was the name of the other two attorneys you consulted in Breed, Abbott and Morgan's office in New York City?

A. They are assistants to Mr. Peyton, and both of them have left since then. In fact, the last time I called at Breed, Abbott and Morgan in New York, they had both left.

1106 (By the Court): What were their names?

A. I don't remember their names, Sir. I met them that one day in Mr. Peyton's office down-stairs, and the next day they were up in Mr. Myers' office. They both left with the Navy later on. They were assistants in the Peyton [fol. 270] department, the tax department of that firm.

1107 Q. (By the Court:) You can get the names?

A. Yes; I will be glad to get them if you want them.

1108 Q. Yes.

A. I will be glad to get them.

1109 Q. When did you employ Mr. Massey?

A. I employed Mr. Massey immediately upon my return trip with the lease.

1110 Q. And that would be about what date?

A. Oh, I would say somewhere around the 21st or 22nd of September.

1111 Q. And when was Mr. Matthews employed?

A. Well, Mr. Matthews was not employed until the Articles of Incorporation were signed—I mean before the Articles of Incorporation—he took care of the Articles of Incorporation and everything else.

1112 Q. About what date?

A. October 3rd—definitely hired by the corporation.

1113 Q. You mentioned in your cross examination that the ASCAP suit was excluded from the lease, and that the Society had made payments of approximately $93,000.00

since 1937, which it was now seeking to recover with triple damages totalling $278,000.00; is that right?

A. I believe that is the amount.

1114 Q. Now, was that amount that was paid out by the Society to ASCAP charged as an item of expense of the station?

A. Oh, yes, certainly.

[fol. 271] 1115 Q. And deducted, of course, from the net income in arriving at the net income of the station?

A. Yes; you see, we haven't had anything of that in 1942—that is one of the reasons why the income jumped, because we didn't pay anything to ASCAP; usually our payments to ASCAP are around $22,000, based on the amount of money we received the last year.

1116 Q. You didn't pay anything to ASCAP in 1942 because the Nebraska Legislature had passed a law that they couldn't collect anything?

A. No; we didn't use any ASCAP music so why should we pay for it.

1117 Q. You didn't use the ASCAP music?

A. That is right, Sir—we are not using it today; we didn't use it all during the time we paid ASCAP; that is why we are trying to get our money back from ASCAP, that is, the Society, at least.

1118 Q. Now, you said that the new company was paying $2177 per month for the space it occupies in the Society's building?

A. Yes.

1119 Q. Is that the same amount that was charged to this station when it was operated by the Society?

A. Yes.

1120 Q. And that was also deducted as an item of expense in arriving at the net income of the station?

A. I imagine it was, Sir; I don't know anything about the books of the Woodmen of the World.

1121 Q. Did you know of Mr. Bradshaw making an offer [fol. 272] to Mr. Carl Swanson of an option to purchase the station at the expiration of the fifteen year lease, to purchase it for $50,000?

A. No sir; Mr. Bradshaw told him very definitely he would not give him an option to purchase the station.

1122 Q. Did you ask or your new company ask for an option to purchase the station?

A. No sir.

1123 Q. Does it have any agreement now for an option to purchase?

A. No sir.

1124 Q. Or understanding that it shall be entitled to purchase the station during the lease or at the expiration of the lease?

A. No sir; the lease stands by itself.

1125 Q. What, in your opinion, would be a fair option price for the station at the expiration of the fifteen year lease?

Mr. Crossman: Objected to as immaterial and not bearing upon any issue in this case. He said there is none, and it is not an issue, and we are going clear outside the issues.

The Court: I don't think that has a bearing.

Mr. Stewart: It involves the value of the station, Your Honor, that is involved in this action, that was under the terms of the lease; they are getting so much for the lease and get the station back; I think they are entitled to ask this witness, who is an expert, what he considers the value of that station.

The Court: Yes—I think he may answer.

[fol. 273] Mr. Crossman: May I ask a preliminary question?

The Court: Yes.

By Mr. Crossman:

1126 Q. Mr. Gillin, to determine what the value of this property will be at the end of fifteen years, you have to know what property will be there, among other things, do you not?

A. Yes sir.

1127 Q. And would one of those factors perhaps be the colored television equipment?

A. Yes sir.

1128 Q. And other installations, perhaps, such as frequency modulation, which I don't know what it is?

A. That is right.

1129 Q. Would that be true?

A. That is right.

1130 Q. And to determine the value of this property at the end of fifteen years, would you also have to take into con-

sideration the development of the radio industry at that time?

A. I certainly would.

1131 Q. And would you also have to take into consideration to determine the value of it at that time, the general status of advertising?

A. You would.

1132 Q. And would you have to take into consideration likewise the condition of your physical equipment at that [fol. 274] time, whatever it was?

A. Yes; you would.

1133 Q. Now, in the absence of a knowledge of those factors and what they will be fifteen years from now, are you able to tell what the value of the station will be fifteen years from now on a turn-back?

A. No, I cannot, because I don't know what it is going to cost to put television in. I don't know what it is going to cost to put facsimile in.

1134 Q. What is facsimile?

A. Facsimile is an instrument which you attach to an ordinary radio set which will print for you your morning or evening newspaper. In other words, if you turn your radio off the regular broadcast band and onto facsimile then your facsimile starts to work and you get your radio by newspaper, so to speak, automatic.

1135 Q. Automatic?

A. Automatic.

1136 Q. And are each of the factors you have mentioned, factors that have to be known and determined factors in order to arrive at an opinion of the valuation fifteen years from now?

A. Yes sir.

1137 Q. In the absence of accurate and specific knowledge with reference to these items, is it possible for you to give an opinion as to the value of this station fifteen years from now?

A. No, and I would also like to add this, that right at [fol. 275] the present time there are KOWH, KOIL, WOW and KBON. KOWH is endeavoring to get full time on their frequency, and if they do there will be much greater competition for other stations located here. At the same time they are trying to switch frequency with KFNF at Shenandoah, Iowa, because they know they can't get new equip-

ment on account of the war, so they are just going to switch frequency. Also KMA at Shenandoah, which has a fine frequency, can be heard in Omaha right now, is increasing its power to 5000 watts, and will be heard in Omaha with a much better signal than it has before, and therefore, will become greater competition to WOW, as well as KOIL and the other stations here.

Immediately after the war KFAB, because of the Havanna treaty which was signed and agreed to by Canada, United States and Mexico and other countries affected, will change its frequency to 1110 kilocycles from 770 kilocycles which it is now operating on at 10,000 watts. 1110 kilocycles is now occupied by WBT Charlotte, North Carolina, a clear channel station, and 770 kilocycles will be given to WBBM in Chicago leaving WBBM full time, 50,000 watts on 770 kilocycles. KFAB will install new equipment at 50,000 watts on 1110 kilocycles, and will become a much greater competitor of WOW than it is at this time. KFAB will change its frequency to the same frequency as WBT, Charlotte, North Carolina, 1110 and will move their transmitter within 20 or 30 miles of Omaha, go to 50,000 watts for the Columbia Broadcasting System, and its frequency [fol. 276] will be given to WBBM in Chicago and WBBM will be full time on 770. When KFAB is 50,000 watts on 1110 and KMA at that time will be throwing a much stronger signal into Omaha from Shenandoah, KOWH will most likely have full time by that time and the KFNF frequency, and we will have all this competition deluge us immediately after the war. If that happens we would not make the net profit in 1943 that we made in 1942; it is just impossible to do it with that kind of competition. Consequently, if we had to put in television, which we are going to have to put in if we are going to exist in the radio business because the Federal Communications Commission say "you either put this equipment in or we will take your license away."—You may then go to Washington for a hearing but you will not be upheld—why, we would then be in a pretty bad situation from the standpoint of what might happen. However, when this war is over and amplitude modulation which is now the regular broadcast band is going to be obsolete because of the television growth and it will be because radio as we know it today was the outgrowth of War No. 1, and radio as we will know it tomorrow will be the outgrowth of War No. 2, then WOW if it puts in television

first in the market will be in a very fine position because it will be first in the field of television.

Mr. Crossman: We object to the question as improper for the reason that it requires qualification of the witness; the witness has shown he cannot qualifiy to answer this question for the reason that the known factors will not [fol. 277] permit him or anybody else to estimate the value of this station fifteen years from now.

The Court: Oh, I think he can explain what he bases it on; he must have some notion, some idea, and in answering it he can explain his answer.

Mr. Stewart: I will ask another question.

1138 Q. Mr. Gillin, after all that you have said in response to Mr. Crossman's questions, you still consider it a good lease for the new company, don't you?

A. Yes sir.

1139 Q. And you knew all of those facts when you made the lease?

A. Yes sir.

1140 Q. Now, in your opinion would the provision in this lease, Exhibit 13 or one similar to it, that the lessee have an option to purchase the station at the expiration of the lease for $50,000.00, be a fair option price for the station?

Mr. Crossman: That is objected to as immaterial; it is not in the evidence, not in the issues, and it is assuming a fact not in the issues and expressly denied by the witness.

The Court: Sustained.

1141 Q. Mr. Gillin, do you think it possible for anyone else to now fix a fair, reasonable price for an option to purchase the station at the expiration of this lease Exhibit 13 or one similar to it?

1142 Mr. Crossman: Well, I don't want to be captious [fol. 278] about it: is it this lease Exhibit 13 or some other lease?

1143 Mr. Stewart: I said this one or one similar to it, if you understand that?

1144 Mr. Crossman: One similar to it may be very much different. I make no objection to the question if as to Exhibit 13 but I reasonably would like to have it confined

to a specific contract, not one similar to it. I make no objection if the interrogation is with reference to Exhibit 13.

1145 The Court: Sustained unless applied to something definite and certain.

1146 Q. All right. Apply it, Mr. Gillin, to Exhibit 13. Do you think a provision in a lease of that kind for an option to purchase for $50,000.00 at the expiration of the lease, would be a fair one?

1147 Mr. Crossman: Now, we are back to the old question. I want to object to this question for the reason that it is not at issue, a $50,000 option. The witness has expressly denied there is any such in fact option; it is entirely without the issues and wholly incompetent and immaterial, and we are right back to where we were.

1148 The Court: You can take this lease as a basis.

1149 Mr. Crossman: You asked another question about this lease.

1150 Mr. Stewart: You said if the question was directed to Exhibit 13 there would be no objection.

1151 Mr. Crossman: Then you immediately left that ques-[fol. 279] tion and went back to the one the Judge sustained.

1152 Mr. Stewart: I said to limit it to this exhibit. I want you to limit it to Exhibit 13.

1153 Mr. Crossman: And I repeat the objection for the reasons given.

1154 The Court: You mean you are objecting to what you said you would agree?

1155 Mr. Crossman: I am objecting to only one thing, Judge, as to what the value of the option would be when it is not within the issues. The witness has expressly denied that there is any such thing in fact, and there is no evidence.

1156 The Court: But you said you would withdraw your objection.

1157 Mr. Crossman: To a different question; it was not this question. You ruled on that question, and he moved to another question, and I asked with reference to the lease, and then he goes back to the question you have already excluded.

1158 Q. (Repeated by reporter) Mr. Gillin, do you think it possible for anyone else to now fix a fair, reasonable price for an option to purchase the station at the expiration of this lease, Exhibit 13, or one similar to it?

1159 Mr. Stewart: Now, answer that as applied only to Exhibit 13.

Mr. Crossman: I have no objection.

A. I don't believe you can set an option in that lease and have the lease O. K.'d first of all, by the Federal Communications Commission. Secondly, if you are going to [fol. 280] put an option there you have got to take into consideration the advance of the art of radio.

1160 Q. Let me interrupt you: I believe you can answer fairly yes or no whether it was.

A. I don't believe you can answer fairly yes or no, because the National Broadcasting Company turned back stations three years ago——(interrupted).

1161 Mr. Crossman: Let me ask him the question——

By Mr. Crossman:

1162 Q. Do you consider—in your opinion can anyone fix a reasonable price for an option in that lease at the present time?

A. You cannot have a lease in effect with the Federal Communications Commission rules and regulations promulgated and adopted by them at the present time; the way they are handled you can't do it.

Mr. Stewart: O. K.—I believe that is all. Just a minute.

By Mr. Stewart:

1163 Q. Who keeps the books and records of the new company, Mr. Gillin?

A. Mr. Al Larson; Alfred Larson, the head bookkeeper of the station.

1164 Q. Was a new set of books opened when the station was taken over?

A. Yes sir.

1165 Q. Are those books available so that they could be [fol. 281] brought over to the court room?

A. Yes sir.

1166 Q. Will you have Mr. Larson bring those books over sometime later in the morning?

A. Yes sir.

Mr. Stewart: That is all, Mr. Gillin.

(Witness excused.)

[fol. 282] FRANCIS P. MATTHEWS called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Massey:

1167 Q. State your name, please.

A. Francis P. Matthews.

1168 Q. How long have you lived in Omaha, Mr. Matthews?

A. Thirty-six years.

1169 Q. I take it that we all agree your principal occupation is that of lawyer?

A. I sometimes wonder, but I think it is.

1170 Q. Now, what other business or business connections do you have here in the city?

A. Well, I am chairman of the Board of the Securities Acceptance Corporation, and president of the First Federal Savings and Loan Association, identified with the O. K. Hardware Store on the South Side, and director of the Northwestern Bell Telephone Company.

1171 Q. And director of the Metropolitan Utilities District?

A. That is an avocation; that is not a business.

1172 Q. Now, you hold some position, do you, with the Knights of Columbus?

A. Yes; I am the Supreme Knight, the International head of the Knights of Columbus.

1173 Q. Is that an elective position of appointive?

A. Yes; that is elective, by the delegates at the National convention held I was elected to that office in 1939 the first [fol. 283] time and was reelected in 1941. Prior to that time I held the office of Deputy Supreme Knight for six years; prior to that, a member of the Supreme Board of Directors of the organization.

1174 Q. Now, will you define just briefly what the duties of the Supreme Knight are?

Mr. Stewart: Wait just a minute: that is immaterial.

Mr. Massey: This will be tied in; it is foundational.

The Court: How will it be tied in?

Mr. Massey: The Knights of Columbus is the fourth largest fraternal society.

The Court: For that purpose you may do that.

1175 Q. Does the Knights of Columbus as a part of their activities conduct a Fraternal Life Insurance Society or company?

A. Yes; it is one of the largest Fraternal Life Insurance Associations in the country; it is, I think, the fourth largest in size.

1176 Q. Now, as Supreme Knight will you define what your duties are as they relate to the insurance activities of the Knights of Columbus?

A. Well, I am the executive head of the organization and direct the affairs of the Society as the head of the Society; I am charged with the responsibilities which the chief executive officer has in the matter of directing all the various activities of the organization. I preside at all board meetings and all meetings of the executive and finance committee; I am chairman of the executive and finance committee and am in charge of the investments which are made on behalf of the Mortuary reserve fund. We have in effect approximately two hundred fifty-five million dollars of insurance; we have in Mortuary assets of the Society the sum of fifty-five million dollars, and my duty as chairman of the executive committee is to look after the investments and reinvestments of those funds. I pass upon the contracts which we issue and I attend meetings of the associations of the Fraternal Congress of America, which is an association of the Fraternal Insurance Associations in the United States and Canada; and generally perform the duties which a chief executive of any business institution performs.

[fol. 284]

1177 Q. Would you say that your duties are substantially similar to those of President Bradshaw as it relates to insurance?

A. So far as the insurance department of our organization is concerned, yes.

1178 Q. How many policy holders are there in the Knights of Columbus?

A. Oh, approximately—I couldn't give you the exact number—it fluctuates, as I recall it, around 220,000—it was nearly 225,000—something like that.

1179 Q. In the various executive sessions that you have mentioned you attend, has the possible effect of the conduct of a radio station by a fraternal organization been discussed?

A. Yes; as a matter of fact the operation of the Woodmen of the World Radio Station by the Woodmen of the [fol. 285] World Fraternal Insurance Society has come up for discussion. That was occasioned by the fact that fraternal insurance societies, as such, enjoy certain exemptions and privileges under the laws of the various states of the country. They render a peculiar service, a special service to their certificate holders and because of the lodge feature of the organization and the association they are recognized as giving to the community a benefit beyond that of the monetary consideration represented by the face value of the certificates of the holders; and on account of that they are and for many years they have enjoyed tax exemptions which are very valuable to fraternal insurance societies as such. Those exemptions are based upon the fact that they are non-profit organizations, and that they are not exactly charitable organizations but they approach the service which charitable organizations render, and on account of that legislatures for years have granted fraternal insurance societies exemption from the payment of taxes; their premium income has not been taxed, and they pay no income tax to the Federal Government. Well now, that obviously has a definite value to the fraternal insurance societies, and anything which would endanger that privilege would be a matter of grave concern to all the fraternal insurance societies. During recent years there has been a trend or a development to eliminate those exemptions and to tax fraternal insurance societies' premiums and their income. The old line insurance companies feel that there [fol. 286] is an inequality or that it is inequitable for them to be compelled to pay taxes on their premiums or taxes which the states impose, while the fraternal insurance societies, which they think and which I question are their competitors, enjoy the exemptions which they have at the present time, and so this matter is a subject that is always discussed when the representatives of fraternal insurance societies get together, and they get together at least once a year, sometimes twice a year, in the meetings of the National Fraternal Congress of America, which is attended by the representatives of the various fraternal insurance societies, and I have heard it discussed among the representatives of other societies generally, the fact that the Woodmen of the World is operating—(interrupted).

Mr. Stewart: Pardon me for interrupting: I think we are entitled to have another question.

1180 Q. Well, at these various sessions has any definite opinion against the operation of a station by a fraternal benefit association been expressed?

Mr. Stewart: Objected to as incompetent, irrelevant and immaterial, calling for hearsay, and for the conclusion of the witness, and not tending to prove or disprove any issue in this case, and evidence which manifestly cannot be met under the circumstances under which it is brought out here. It is invading the providence of the court, and what other insurance companies or representatives of ther insurance [fol. 287] may feel toward the operation of this station by the Woodmen of the World has no bearing on the issues before the court. I suppose they could call one hundred different insurance men to debate that question, but that is not involved.

1181 The Court: The question does not cover that; the statement was made here that is one of the charges the Woodmen of the World had—I think he may answer.

1182 Mr. Stewart: It is hearsay that we cannot combat, that somebody at some meeting made some statement.

1183 Mr. Wells: It is an issue in this case, in the pleadings and in the statement made; that is one of the reasons we called him.

1184 Mr. Stewart: We made no issue that some other insurance group feel the Woodmen should have disposed of the station. We claim that this lease as made was improperly made and it seems to me we are going far afield to bring in what some other insurance company's representative believes about making this lease.

1185 The Court: That would not be the point; the point is whether they seek to tax fraternals.

1186 Mr. Stewart: He has already stated there was some discussion of taxing fraternals; now he is speaking specifically about the Woodmen operation.

1187 Q. Well, let us put it this way, Mr. Matthews: can [fol. 288] you state what the general concensus of opinion was with reference to fraternals operating a private radio station for profit?

1188 Mr. Stewart: Objected to as calling for a conclusion as to what the concensus of opinion was, and further it is immaterial as to what other insurance companies may think about the operation of this station. It is a question of whether this lease before the court is valid.

1189 Mr. Massey: Underlying that is the honesty of the acts which prompted the execution of the lease, and this is one of the reasons that the directors acted as they did.

1190 The Court: I think you may answer.

A. Yes.

1191 Q. Will you state what that was?

Mr. Stewart: Objected to as calling for a conclusion as to what the concensus of opinion was, and further it is immaterial as to what other insurance companies may think about the operation of this station.

A. The general opinion was that operating a radio station or any private business for profit seriously imperiled the tax exemption privileges which the fraternals had, and aggravated the situation with state legislatures which was one that indicated a growing tendency on the part of legislatures to tax fraternals. The operation of the Woodmen of the World Radio Station and the profits which it was making from that business enterprise gave the legislatures and it was used as an argument as to why fraternals should be taxed. With our own Board of Directors we regretted [fol. 289] the fact that the matter had come up, and they expressed the wish that it could be eliminated from the picture, if possible.

1192 Q. Do you feel that the income from a station should be subject to income taxes?

Mr. Stewart: Objected to as immaterial.

The Court: I don't think it makes any difference how he feels: if a large number is shooting at them though, that is a different thing.

1193 Q. Mr. Matthews, when did you decide to lease the radio station yourself?

A. It was mentioned early in July sometime.

1194 Q. Where was that?

A. That was at a meeting of the Board of Directors of the Securities Acceptance Corporation.

1195 Q. Can you tell us how it came about?

A. Mr. Landen, president of our company said—(interrupted).

Mr. Stewart: Just a minute: objected to as to what Mr. Landen said as immaterial.

The Court: It would hardly be material, what he might think about it.

1196 Q. Let us put it this way: who brought the proposition to your attention?

A. Mr. Landen, the president of our corporation.

1197 Q. Was it before your board or to you personally?

A. It was to our board.

[fol. 290] 1198 Q. Had Mr. Landen been approached with reference to purchasing or leasing the station?

A. Yes, he had; he submitted a proposal——(interrupted.)

Mr. Stewart: Just a minute: I object to the volunteer statement of the witness as being a hearsay statement and no foundation laid.

The Court: Well, with reference to this business I think he may answer.

A. (continued) Mr. Landen said he had a proposal from Mr. Gillin, stating that the Woodmen of the World was disposed to get out of the radio business and wanted to know if our group would be interested in purchasing or acquiring the station under some arrangements, and some of the directors expressed interest, and wondered why the Woodmen of the World would want to dispose of the station, and I stated I was not surprised at all because I was surprised that they hadn't disposed of it long before, because of this tax situation, and I explained it to them very much as I have explained it here this morning, and our directors were interested to the extent that they instructed Mr. Landen to explore the matter further.

Mr. Stewart: Well, ask another question so I will have a chance to make a proper objection.

1199 Q. Well, first, did Mr. Gillin approach your company with reference to selling or leasing?

A. Both.

1200 Q. Then an investigation was made—what did that [fol. 291] result in, what happened?

Mr. Stewart: That is objected to as incompetent, irrelevant and immaterial.

The Court: Yes—what they did is a different thing.

1201 Q. Well, what was done?

A. Mr. Landen conferred further with Mr. Gillin and reported back that the matter, that the proposition that was submitted was in the nature of a lease proposition, and there were other conditions, and that he didn't think it was an attractive enough proposition for our company to consider.

1202 Q. Was that the end of it at that time?

A. That was the end of it so far as our company was concerned, yes.

1203 Q. Now, who approached you personally to become a stockholder in Radio Station WOW, Inc.?

A. Mr. Gillin.

1204 Q. And about when was that?

A. Well, that was sometime shortly before, say within a month prior to the time when the negotiation for the lease was accomplished.

1205 Q. That would be sometime in early September, 1942?

A. I think so; I just don't recall the date.

1206 Q. Where did he see you with reference to the matter?

A. I don't recall; it was somewhere—I think it was in my office; I am not sure.

1207 Q. After Mr. Gillin saw you, what did you do?

[fol. 292] A. Well, I expressed an interest in the matter. I said, well, I would like to see what the terms and conditions were, and then told him I would like to know what the proposition was and what his position would be with respect to it, and then the matter was outlined to me. I told him that I had known him for a long time, and I knew his father before him, and that if I could help him establish a company here and make it possible for him to carry on the business, that I had enough confidence in him to invest in a company which he would head up.

1208 Q. After that did you discuss the matter with Mr. Bradshaw?

A. I didn't discuss the matter with Mr. Bradshaw until I saw him in company, I think, with Mr. Gillin, sometime after that.

1209 Q. Can you fix the date or approximately the date?

A. I cannot fix that.

1210 Q. What transpired at that meeting?

A. Well, there was a discussion of the proposal to lease the station. There was a discussion, as I recall, with the people who were to be interested in the enterprise, and I think we discussed the terms of the lease; as I recall, I made some suggestions with regard to some provisions of the lease—I can't recall what they were; I haven't any memorandum or record on that.

1211 Q. Did you have any discussions with any of the other officers of the insurance society with reference to you becoming a stockholder?

A. Never.

[fol. 293] 1212 Q. You are acquainted wi[illegible] Mr. Bradshaw?

A. Yes; I have known Mr. Bradshaw for a number of years.

1213 Q. And Mr. Patterson?

A. Mr. Patterson also.

1214 Q. And Mr. Newberry?

A. Yes, Mr. Newberry.

1215 Q. Mr. Ruess?

A. Yes.

1216 Q. Mr. Braden?

A. Mr. Braden, yes.

1217 Q. Mr. Carl E. Miller?

A. I don't know that I know Mr. Miller.

1218 Q. And Mr. Sterling Holston?

A. I don't know that I know him.

1219 Q. The men that you do know, what is the nature of your acquaintance with them—is it close or casual, business or social?

A. I would say it is more or less casual. I know Mr. Bradshaw better than any of the others. I have known him for some years, but I see him—I happen to have an office in their building and I see him several times a year, but I have had no social association with any of the officers.

1220 Q. Have you any business association with them by reason of being a tenant of the building?

A. No, sir.

1221 Q. Mr. Matthews, how many shares of common and preferred stock of Radio Station WOW do you own? [fol. 294] A. Two hundred.

1222 Q. And what did you pay for each class of stock?

A. I paid $99.00 a share for the preferred stock, and $1.00 per share for the common stock.

1223 Q. And I will ask you a personal question: where did the money come from you used to purchase that stock? Did you draw a check for it or did you borrow?

A. I drew a check for it on the money I had in the bank. Now, where the money came from in the bank—(interrupted.)

1224 Q. I don't care—I just wanted to know whether you had the money in the bank or borrowed it.

A. I paid cash out of my bank. If you want to know about my personal affairs I can tell you. I am a creditor at the Omaha National Bank and borrow money from them from time to time on my own personal note without any collateral. I borrowed money for several times last year; whether this was part of the borrowed money or other money, I couldn't tell you without looking the record up, but it was my own money and nobody helped me get the money.

1225 Q. Where are the stock certificates issued to you?

A. They are in my office or in my safety deposit box—I don't know; my secretary takes care of those matters.

1226 Q. Is it your own stock?

A. Absolutely.

1227 Q. Have you read the petition filed in this case?

A. I don't know how carefully I have read it—yes.

[fol. 295] 1228 Q. Are you familiar with the fact you are charged with being an associate of the officers of the Woodmen of the World Life Insurance Society in a plan to secretly secure possession of this radio station for the benefit of the officers of the Society and your benefit, and to the detriment of the policy holders?

A. Only to the extent that it is set out in the petition.

1229 Q. By implication, Mr. Matthews, it is charged that the officers of the Woodmen of the World Life Insurance Society are in some way going to benefit from the operations of Radio Station WOW, Inc. With that as a preliminary, let me ask you whether there is any person or any company or any firm which has any interest what-

ever in any stock which you own in this new lessee company?

A. No one except my individual self.

1230 Q. Now, is there any understanding or any agreement, either written or oral or implied that might now be effective or that might become effective upon the happening of any contingency, whereby anybody shall acquire any interest in the stock that you now own?

A. No; none whatever.

1231 Q. Or any benefits or gains which might accrue from such ownership?

A. None.

1232 Q. Mr. Matthews, are you in any way associated with any of the officers or directors of the Woodmen of the World Life Insurance Society in this venture?

[fol. 296] A. Not in the least, in no way whatever.

1233 Q. Do any of them, to your knowledge, have any interest in radio station WOW whereby they personally or anyone through them stand to gain or lose by operation of the station of the new company?

A. No.

1234 Q. Do you have any knowledge of such a plan?

A. None whatever.

1235 Q. Now, the plaintiff alleges in paragraph 13 that Radio Station WOW, Inc., is dominated and controlled by the officers of the Society, and by persons interested in the Consumers acquiring the Nebraska Power facilities: is that a fact?

A. No; it is not.

1236 Q. Who does dominate and control Radio Station WOW, Inc.?

A. The stockholders.

1237 Q. Does anybody else?

A. No.

1238 Q. To your knowledge can you state whether or not any of the stockholders, officers or directors of Radio Station WOW, Inc., are related to any officers of the Society?

A. Not to my knowledge.

1239 Q. Are you related to any of them?

A. Not at all.

1240 Q. Is there any agreement or is there any understanding, written, oral or implied, whereby any friends

[fol. 297] of the directors of the Society or their relatives shall be employed by WOW, Inc.?

A. None whatever. It is ridiculous to even think there would be.

1241 Q. Has any officer or director of the Woodmen of the World Life Insurance Society ever suggested any such thing to you?

A. Never.

1242 Q. Why did you purchase the stock in this new company, Mr. Matthews?

A. As an investment, and as an expression of confidence in John Gillin.

1243 Q. Now, I don't know whether it is material but the power issue has been injected in this law suit: are you at the present time the attorney for the Consumers Public Power District?

A. I suppose I am; I was when I left for Europe.

1244 Q. Is that as general counsel or in a particular law suit?

A. No; the connection I had with them was in connection with the proposal which the Consumers Public Power District made to purchase the Nebraska Power property from the Nebraska Power Company.

1245 Q. Well, you might as well state whether you favor that sale or not?

A. I do absolutely.

1246 Q. Now, by reason of that fact were you in any way induced to become a stockholder of the Radio Station WOW, Inc.?

A. Not in the least.

1247 Q. Was the possibility of using the time of this station to progagandize this sale ever discussed?

A. Never in my presence was anything said about the Consumers Public Power District or sale of the Nebraska [fol. 298] Power Company mentioned in connection with this radio station transaction.

1248 Q. Is there any connection whatever between the Consumers and this Radio Station WOW, Inc.?

A. Absolutely none.

1249 Q. Is a part of the time of this station being devoted to programs promoting or seeming to promote the sale of the properties?

A. Not to my knowledge, and I don't think it would be unless they wanted to pay for it. Radio Stations, you

know, have to deal impartially in matters of that kind. Newspapers can publish anything they want to without any supervision, but radio stations are controlled by official regulations. If the Consumers Public Power District wanted time on the WOW I presume they could purchase it if it was available, the same as on KOIL or any other station, but it would not be possible for them to get any favors any more than it would be for the Nebraska Power to get favors over the station. They buy time and use it over the station the same as any plant may do that handles that business.

Mr. Massey: I believe that is all.

Cross-examination.

By Mr. Stewart:

1250 Q. Would you consider the use of the station for promoting the sale of the Omaha Power to the Consumers a proper use of the facilities, Mr. Matthews?

A. How do you mean?

[fol. 299] 1251 Q. Mr. Crossman: You mean the Nebraska Power?

Mr. Stewart: Yes.

Mr. Crossman: I will object to the question as not understandable.

Mr. Stewart: Well, if it isn't understandable I will ask another question.

1252 Q. Would you consider the use of Radio Station WOW to sponsor the sale of the Nebraska Power Company facilities to the Consumers Public Power District of Nebraska a proper use for the station?

A. I am sorry, Mr. Stewart, I don't know that I understand exactly the purport of your question. May I answer it this way: by that, do you mean would I consider it proper for the Woodmen of the World Radio Station to sponsor and itself promote propaganda to induce the sale of the Nebraska Power assets to the Consumers Public Power District?

1253 Q. Well, would you consider that proper?

A. I would consider that highly improper.

1254 Q. Would you consider it proper for the station to permit its facilities to be used by anyone else to sponsor the sale of the Nebraska Power facilities to Consumers?

A. If you mean by that would I consider it proper for the Radio Station, to sell its time to representatives of the Consumers Public Power District to explain their proposition to purchase the Nebraska Power assets by radio talks, paying for that time the regular compensation for any time that is used on the radio—is that what [fol. 300] you mean?

1255 Q. No, I didn't intend to limit it to Consumers representatives—those and anyone else: in your opinion would it be proper for them to use the facilities of the station for promoting that sale?

A. Certainly, if they paid for it, just the same as it would be proper to buy advertisements in the newspaper to oppose a sale or recommend a sale.

1256 Q. Are you acquainted with Guy Myers?

A. Yes; I know Mr. Myers.

1257 Q. How long have you known him?

A. Oh, I have known him several years.

1258 Q. What has been the nature of that acquaintance?

A. More or less casual; I knew him several years ago when he was here; I met him at that time casually, and I have seen him at very irregular intervals.

1259 Q. Have you represented him?

A. No.

1260 Q. Have you discussed with him the proposition of the Consumers buying the Nebraska Power Company facilities here in Omaha?

A. Yes.

1261 Q. Are you attorney for the Radio Station WOW, Inc.?

A. I have done some legal work for them, yes.

1262 Q. Did you handle the incorporation of that company?

A. Yes; my office did.

1263 Q. Did you personally?

[fol. 301] A. I did some work on it personally; yes.

1264 Q. When did you first become employed by that company, as nearly as you can recall?

A. The morning when the incorporators met and it was decided the Articles of Incorporation was approved and it was decided to incorporate and go ahead.

1265 Q. Who prepared those Articles of Incorporation?

A. Well, I worked on them. I can't tell you; I can't recall the circumstances of their origin; I am not sure—

I think I dictated them but I am not certain about that. They are based upon quite a general form of Articles we have used in our office.

1266 Q. I understand that they were not prepared until the day the company was incorporated, the Articles?

A. I can't say just as to the day, Mr. Stewart, but about that time.

1267 Q. How long did you say you had known Mr. Gillin?

A. Oh, I have known John Gillin for I would say twenty years, probably.

1268 Q. Has that been a close friendship?

A. Not an intimate friendship, no; I have no social contacts with him at all. I meet him, since I have been in the building I have seen him oh, several times a year, maybe once or twice a month, just casually.

1269 Q. How long have you and Mr. Bradshaw been friends, approximately?

A. I would say fifteen or twenty years.

1270 Q. Do you know Mr. Bradshaw's son-in-law, John Dawson?

[fol. 302] A. Yes; I know Mr. Dawson, not well at all.

1271 Q. Are you acquainted with the firm of Abbott, Breed and Morgan in New York City?

A. No, I am not.

1272 Q. Do you expect to participate in the management of the new company?

A. Do you mean in the active management of the new company?

1273 Q. Yes.

A. No; I would not have time for that.

1274 Q. Do you expect to participate other than as a director?

A. And as vice-president.

1275 Q. What duties do you expect to perform as vice-president?

A. I am waiting to find out. You know how much scenery vice-presidents are, don't you?

1276 Q. Well, I assume you would only act in the event the president was unable to act?

A. I think we can assume that. I think you and I can agree on that.

1277 Q. Was a resolution adopted by the Board fixing the price at which the stock was to be sold in the new company?

A. Yes.

1278 Q. Did you prepare that resolution?

A. I don't know whether I did or whether I actually prepared it—I think, Mr. Stewart, it was done after I left for Europe; I am not sure.

1279 Q. Do you recall that the preferred stock is en- [fol. 303] titled to a dividend, a cumulative dividend of 7 per cent?

A. Yes, if and when declared by the Board of Directors.

1280 Q. Did you vote for the adoption of the resolution that fixed the price of the stock that was to be sold?

A. I couldn't say; I would have to look up the record of the minutes of the directors and see whether I was present at that meeting or not.

1281 Q. You know, do you, that the preferred stock was sold at $99.00 a share?

A. Yes.

1282 Q. The A and preferred B stock was sold for a dollar a share?

A. Yes.

1283 Q. And the common stock for a dollar a share?

A. Yes.

1284 Q. And that the preferred stock B is all held by Mr. Gillin?

A. That is my recollection.

1285 Q. That he received 250 shares for a dollar a share, $250.00, under which, by resolution of the Board of Directors and the Articles of Incorporation, he is entitled to a comulative dividend of $7.00 per year per share?

A. Well, his stock provides for that if it is declared by the Board of Directors, yes.

1286 Q. And that stock, as I understand it, was sold to Mr. Gillin at that price because of his service in procuring the lease of the station for the new company?

A. Well, my understanding of it was that generally it [fol. 304] was given to him to fix his interest in the corporation and to get—I don't think it was in the nature of a compensation—it is quite an usual arrangement; I have seen it done in other corporations I have been associated with, and it was for the purpose in my opinion, at least, so far as I was concerned, in arranging that he would have a sufficient vested interest in the corporation that we would be assured of having his management in-

definitely. He is a very valuable man in the radio field, and I know he is looked upon with great favor, and there are a lot of stations that would be glad to have him.

1287 Q. Well, the rest of you paid $99.00 a share for the preferred stock A and the preferred stock B was, with the same dividends and other rights and privileges, was sold to Gillin for a dollar a share: is that right?

A. Now, that is not entirely right, Mr. Stewart. You have forgotten, I suppose, the A stock has higher priority than the B stock, and none of the B stock can be retired until all the A stock is retired.

1288 Q. Is that an advantage to the A or to the B stock?

A. It is an advantage to the A stock, don't you think?

1289 Q. No, I don't agree with you, with a stock that costs one dollar a share and pays a dividend of $7.00 a year per share; a holder would not want that stock retired, would he, Mr. Matthews?

A. Well, if we retired it, he wouldn't have anything to say about the retirement; the corporation would deter- [fol. 305] mine about the retirement of it, and if he paid a dollar for it and it would be retired at $100.00, he might like to have it retired.

1290 Q. And is that the price at which it is retireable?

A. That is my recollection of it; it should be if it isn't.

1291 Q. So that the stock that Gillin paid $250.00 for is subject to retirement for $25,000?

Mr. Crossman: I want to make an objection to this. We continue to interrogate this witness about a written document that is in evidence here and he has been through all of this interrogation. Here are the Articles of Incorporation, Exhibit 12; I think it is only fair to the witness, if you want to interrogate him, that you pass him up the Exhibit that is in the lawsuit, and inquire after examination if this is correct or not.

Mr. Stewart: Is there any question about it? Am I right or not?

Mr. Crossman: I haven't the slightest idea, but I want to object here.

1292 Mr. Wells: We are trying a lawsuit here in which the rights of the stockholders in WOW, Inc., are not in controversy; that had nothing to do with it; this is a charge against the Woodmen of the World Life Insurance Society and its directors; any error which is made in the organiza-

tion of the other corporation, which is foreign to this case —suppose it is all wrong.

Mr. Stewart: My answer to that is, it is material on [fol. 306] this point, that Gillin participated in the negotiations for the disposition of this Radio Station, and when he was doing that he was working as the manager of the station for the Society and receiving $16,000 a year for it, and at the same time he was making this other deal whereby he gets stock retirable at $25,000 for $250.00, and making a deal whereby he increases his compensation from $16,000 a year to $20,000 a year. Now, I think it highly important on that point to show the conflicting interests and the advantage to Mr. Gillin in making this deal which he did.

A. Of course, that is not an unusual arrangement.

1293 Q. Mr. Matthews, have you now determined whether that stock is retirable at $100.00 a share?

A. Yes; it is, Mr. Stewart.

1294 Q. Mr. Matthews, where is the headquarters of the Knights of Columbus?

A. New Haven, Connecticut.

1295 Q. Does it have an office building there?

A. Yes; we have a million dollar building there.

1296 Q. Does it occupy the entire building?

A. Yes; we have, I think approximately 300 employees there.

1297 Q. Does it have any other buildings over the country?

A. No; that is, the Supreme Council does not have; the local councils have many of them scattered around the country.

1298 Q. Is any part of the Knights of Columbus Building at New Haven rented out to other parties?

[fol. 307] A. No.

1299 Q. I understood you to say that Mr. Landen reported that Mr. Bradshaw had offered to lease the station to your company?

A. I don't think I used Mr. Bradshaw's name, did I? Mr. Gillin, I think—Mr. Gillin reported.

1300 Q. And did Mr. Landen say whether Mr. Gillin had mentioned the sale of the station, or was it merely a lease?

A. No; he was dissatisfied in his report as to what the proposition was; it didn't appeal to him at all.

1301 Q. Well, was it considered by the Board of the Securities Acceptance Corporation as a lease proposal or purchase?

A. Well, we didn't get into the details of the matter at all. Mr. Landen made the investigation and became dissatisfied, wasn't interested in it, and that ended it as far as we were concerned.

1302 Q. Who did you say first talked with you about participating in a group that was to either lease or buy the station?

A. Well, Mr. Landen.

1303 Q. And who next talked with you about it?

A. My recollection is it was Mr. Gillin.

1304 Q. And about when was that?

A. Oh, that was about, oh, you might say sometime in September; I couldn't give you the date.

1305 Q. At that time did Mr. Gillin mention the group were considering buying or leasing the station?

A. Leasing is the information I got.

[fol. 308] 1306 Q. Did I understand you to say, Mr. Matthews, you did not know whether you had borrowed any money for the purchase of your stock?

A. I can find out, if you want me to.

1307 Q. No—I didn't know whether I understood you; did you say you didn't know?

A. I can find out the details.

1308 Q. I am not interested in the details: do you know whether you borrowed the money for your stock?

A. No; I couldn't tell. I borrowed some money about that time for another deal and I couldn't tell you which money was involved. If it is material——(interrupted).

1309 Q. No; I just didn't know whether I understood you. When did you receive your stock?

A. I received my stock the other day when I returned from Europe. It has been ready for me.

1310 Q. As I understand it you have 100 shares of preferred A and 100 shares of common stock?

A. I believe that is right.

1311 Q. There isn't, or is there any state that now taxes fraternals?

A. Yes.

1312 Q. What ones?

A. New Mexico. I could get you all that if you want it; I have got it in my file. There is a bill in the Nebraska Legislature pending now.

1313 Q. What are the ones that tax fraternals now?

[fol. 309] A. I would have to look at my files; I know New Mexico does. I know they have threatened to take our license away to do business in New Mexico because we are objecting to the tax.

1314 Q. And New Mexico is the only one that you now recall that now taxes fraternals?

A. That is the only one I can say positively.

By Mr. Wells:

1315 Q. Mr. Matthews, we decided to inquire of you whether the taxation threat against the Woodmen of the World Life Insurance Society, as a fraternal life insurance society by reason of its past operation of Radio Station WOW, did you know of litigation that the Woodmen of the World had and other fraternal life insurance companies, just a few years since?

A. Yes; I remember that litigation.

1316 Q. Over the tax question?

A. Over the tax question, yes.

1317 Q. In what states were those actions pending, if you recall?

A. Well, I think they were in Texas, Oklahoma, Arkansas, Missouri, Iowa, and I think one or two others.

1318 Q. Wasn't it also in New Mexico and Mississippi?

A. New Mexico and Mississippi, yes.

1319 Q. In those tax cases is it true or not that the income received by the Wodmen of the World from this radio incidental to the insurance business, was used as evidence of liability for gross premium taxes?

[fol. 310] Mr. Stewart: Objected to as immaterial, not the best evidence.

The Court: Better ask him if he knows.

1320 Q. Do you know?

A. Yes.

1321 Q. State.

Mr. Stewart: Objected to as immaterial and not the best evidence.

The Court: You may answer.

A. Yes; it was advanced as a reason why the Association should be taxed.

1322 Q. Were other fraternal life insurance societies also sued in those named states?

A. Yes: they were. The Knights of Columbus was defendant in some of those suits.

1323 Q. The one you represent?

A. Yes.

1324 Q. In addition to that threat in those litigations, do you know whether or not there is now pending in any state legislature a bill to tax fraternal benefit societies on their gross premiums?

A. Yes sir.

Mr. Stewart: Objected to as incompetent, irrelevant and immaterial, not proper cross-examination and not the best evidence, and I ask that the witness' answer be stricken out because it was made before an objection could be interposed.

[fol. 311] The Court: I will leave the answer stand. He may answer now.

A. Yes.

1325 Q. Where?

A. In Nebraska. I was called with respect to it by Mr. ——(interrupted).

Mr. Stewart: Objected to as not responsive and obviously hearsay evidence.

The Court: It may be not responsive, but I think he can answer if you ask the questions.

1326 Q. In what states and in what manner?

A. Well, there is a bill pending in the State of Nebraska to levy a tax upon the premiums of fraternal insurance societies which are not organized in Nebraska.

1327 Q. Is it your opinion that the operation of the WOW station by the Woodmen of the World caused this agitation, placed it and the other fraternal benefit societies in a hazardous position and subjected themselves to gross premium taxes in various states?

Mr. Stewart: Objected to as immaterial and calling for a conclusion.

The Court: I think that is opinion evidence.

Mr. Wells: I am asking for his judgment.

The Court: If he knows from what happened.

1328 Q. Is it one of the factors that threatens the repeal [fol. 312] of these immunity tax statutes?

Mr. Stewart: Objected to as immaterial and calling for a conclusion.

The Court: I think it is leading; no objection is made on that ground.

Mr. Stewart: I object to it also on that ground.

The Court: Objection sustained.

1329 Q. What is, if you know, the effect that the operation of Radio Station WOW does have upon the repeal of tax statutes of the various states as to fraternal benefit societies.

Mr. Stewart: Objected to as calling for a conclusion and immaterial.

The Court: Do you know whether it has any effect?

The Witness: I have an opinion on it, yes.

The Court: What is that opinion based on?

The Witness: Based upon discussions that have been had with respect to the proposal to repeal these statutes in various states.

The Court: You may answer.

A. In my opinion the continued operation of the Woodmen of the World Radio Station by the Woodmen of the World Life Insurance Society would be very detrimental to the Woodmen of the World and to all fraternal insurance societies generally, because it is referred to as an instance of where a fraternal insurance society enjoying immunities [fol. 313] from taxation, is capitalizing upon that provision by operating a commercial enterprise at great profit, and it is frequently and continuously referred to and objected to by other insurance societies in the fraternal field, and by old line insurance societies, and by people who are instrumental in initiating and promoting the adoption of these laws which would repeal the tax exemption of fraternal insurance societies.

1330 Q. When Mr. Gillin first came to you concerning the organization of Radio Station WOW, Inc., was there any discussion between you as to the relationship that that station would have for the Consumers Power Company, or

Nebraska Power Company or any other interest other than the operation of it as a radio station?

A. The Consumers Public Power District or the Nebraska Power District or matters involved between the Consumers Public Power District and Nebraska Power Company, were never mentioned to me by anybody connected with that acquisition of the radio station.

1331 Q. Either by him or——(interrupted)

A. By absolutely nobody, Mr. Wells; there was never any reference made to the Consumers Public Power District or Nebraska Power Company by anybody in my presence, or anything said about it at all; there was not in any sense of the word the slightest connection between the two matters.

1332 Q. Would you have purchased any stock in the Radio Station WOW Incorporated if you had been obligated directly or indirectly by inference or innuendo to contribute [fol. 314] any part of the earnings of your stock to any officer of the Woodmen of the World?

A. Of course, I would not.

1333 Q. Would you consider it an honorable transaction?

A. A most dishonorable transaction, and I am sure nobody connected with this enterprise would even think of doing such a thing.

1334 Q. It has been mentioned in evidence about you having returned from Europe: how long, and when were you in Europe?

Mr. Stewart: That is objected to as immaterial; it has no bearing on this case.

The Court: There is nothing prejudicial in that anyway.

A. I left here on Christmas night and returned to Omaha a week ago last Sunday, I think it was.

Mr. Wells: That is all.

Cross-examination.

By Mr. Stewart:

1335 Q. Mr. Matthews, does the WOW Society own its building here, Omaha building?

A. I understand that it does.

1336 Q. Does it occupy all of the building?

A. No.

1337 Q. Or does it rent out a part of it?

A. No; the building is not all occupied by the Society. I have an office in the building myself, and there are many other tenants that are not connected with the Society, a great many of us.

[fol. 315] 1338 Q. And you pay the rent for the space that you occupy?

A. You bet—when I can make it.

1339 Q. And you think it proper for the Woodmen to rent that space to you?

A. Oh, sure.

1340 Q. You do?

A. Yes.

1341 Q. You don't think that is a money making proposition that the Woodmen of the World Society is engaged in, in renting that space to you?

A. No; that is an investment; that is recognized by all insurance societies as very proper and an investment.

1342 Q. It makes a good return on the investment?

A. I would hope so. Knowing its ability, I would say it is a good return.

1343 Q. But it isn't as good a return as the radio station makes for the Society?

A. I think that the lease that the Society has on the radio station will make a better return than even its building investment, and that is a good investment for the Society. That is an investment; that is not a business.

1344 Q. You know that the Woodmen's Society's net income from that radio station last year was $278,000 or more?

A. Yes, something like that.

1345 Q. And that under the lease which has been made from the station over the period of the lease, assuming that [fol. 316] they receive it, it will be an average of about $74,000 a year?

A. I will take your figure.

1346 Q. And that that transaction is costing the Woodmen then over $200,000 a year less of net income?

A. Well, considered as income, perhaps I should say there are other elements of value to the Woodmen connected with the leasing of this radio station, a matter of eliminating it as a danger or source of taxation which would be a great deal more than what they get out of the lease of the station and what they realize from the operation of the station, and of course, there is nothing certain about what it will realize

in the future from the operation of the station; it might lose them money. It might lose us money; I don't think it is such a hot proposition.

1347 Q. Of course, if it loses you money, you can just step out of the picture and let them take it back?

A. Oh, no. We have quite a stake. It might not be to you but to me $10,000 is quite a bit; I would want to save it if I could.

1348 Q. Do you believe that that station has been of any benefit to the Society as a creator of good will and advertising value?

A. Not in the least. We considered at one time the advisability of having a radio station, and we decided it would be more trouble and annoyance than it possibly could be worth—couldn't see where it would add one iota to the business of the Society, and we called it off and dropped it like [fol. 317] a hot potato; we wouldn't have a radio station today as a gift to the Society and I tell you that after I have studied the matter very seriously.

1349 Q. Then I assume you believe the officers of the Woodmen of the World exercised poor judgment in operating this station over the period of years they have for the purpose of advertising the Society and creating good will for them?

A. Well, I will say I disapproved of their policy of doing that; I thought they were short sighted in doing it.

1350 Q. Now, this litigation that you mentioned in several states where it was proposed to tax the income of the fraternal societies, that didn't apply only to the Woodmen, that applied to all fraternals?

A. Well, the fraternals operating, I think, in those particular states. I might state, if you are interested, that we were, the Knights of Columbus were dismissed out of the litigation on the showing that we had no commercial enterprise of any kind; that we were operating strictly within the recognized limits of fraternal insurance operation.

1351 Q. Well, the bills were to tax the premiums, weren't they, that were introduced?

A. Yes; they were proposed taxes.

1352 Q. And the Knights of Columbus receive premiums, don't they, on their insurance?

A. Well, we don't call them premiums.

1353 Q. Well, it is for insurance, whatever you call them, isn't it?

[fol. 318] A. Yes.

1354 Q. Now, all of that litigation terminated in favor of the fraternals?

A. Well, I think so. I wouldn't want to be held too closely on that—I would say, to the best of my knowledge.

1355 Q. Can you give us the number of that bill that you said was now pending in the legislature?

A. Well, I can give you a copy of it after lunch, if you want it.

1356 Q. Then I will ask you to bring it.

A. I don't know whether I want to give you my only copy of it.

1357 Q. I will see that you get it back.

A. I think that bill, while it only taxes Societies which are not authorized in the State of Nebraska, nevertheless establishes a reciprocity agreement; on that basis the Woodmen of the World will have to pay non-resident taxes in other states just as they pay taxes in this state, so while it deals with non-residents it applies just as viciously to the Nebraska companies.

1358 Q. Will you see that I get a copy of that bill?

A. Yes.

1359 Q. Do you think the lease of the station by the Society will now prevent the levy of taxes on the fraternals?

A. I think it will be very very helpful. If you have any more leases like this that you want to get rid of, I would like to have one for my Society.

[fol. 319] Mr. Stewart: I would like to have one myself.

By Mr. Wells:

1360 Q. You are familiar with the bill you testified about?

A. Yes.

1361 Q. Let me ask you if it isn't Section 77-902 of the Statutes, if it doesn't strike out the exemptions that would prevent gross premium taxes?

A. That is my understanding; that is right.

(Witness excused.)

Thereupon an adjournment was taken until 1:30 P. M. of the same day, March 3, 1943.

[fol. 320] (1:30 o'clock P. M., March 3, 1943.)

1362 Mr. Crossman: Before Mr. Pakes is sworn, may I ask leave to supply for the record a matter that Mr. Stewart inquired of Mr. Matthews to supply at the close of his testimony? I will ask the reporter to identify it as Exhibit 15.

1363 The Court: Bill proposed for legislative act.

1364 Mr. Crossman: In the Nebraska Legislature, tax premiums. This was at the request of Mr. Stewart, and, of course, he has the original right to offer it. If he does not wish to, I wish to offer it as part of the examination of Mr. Matthews.

1365 Mr. Stewart: I have not examined it. Go ahead and offer it, if you want to.

1366 Mr. Massey: You better examine it.

1367 Mr. Crossman: You may offer it, if you wish to.

1368 Mr. Stewart: No.

1369 Mr. Crossman: We will offer it now so that it will be a matter of record.

Exhibit No. 15 was received and read in evidence, forms a part hereof, and is hereto attached, as follows:

[fol. 321] EXHIBIT "15"

LEGISLATURE OF NEBRASKA

Fifty-sixth Session

Legislative Bill 344

Introduced by George I. Craven of Lancaster.

Read first time February 1, 1943.

Read second time February 2, 1943.

Referred to committee on Banking, Commerce & Insurance.

Sent to printer February 2, 1943.

A Bill

FOR AN ACT to amend section 77-902, Compiled Statutes of Nebraska, 1929, relating to taxation of foreign life insurance, accident and life and accident insurance companies transacting business in Nebraska; to eliminate the exemption of fraternal associations and

mutual companies operating on the assessment plan from the taxation on gross premiums therein provided; and to repeal the original section.

Be It Enacted By The People of The State of Nebraska:

[fol. 321a] Section 1. That section 77-902, Compiled Statutes of Nebraska, 1929, be amended to read as follows:

77-902. Every life insurance and accident insurance, or life and accident insurance company organized under the laws of any other state or country, and transacting business in Nebraska,* [except fraternal beneficiary associations and such mutual companies as operate on the assessment plan, have no capital stock and make no dividends, and whose scheme of insurance does not contemplate the return of any percentage of earnings or profits to policyholders,] shall, at the time of making the annual statements as required by law, pay into the state treasury two per cent of the gross amount of premiums received by it during the preceding calendar year for business done in this state, including all insurance upon the lives of persons residing in the state, whether such insurance was written during such preceding year or prior thereto. At the time of paying the taxes such companies shall take dup-icate receipts therefor, one of which shall be filed with the* [state auditor] *Department of Insurance*. No certificate shall be issued by the* [auditor] *Department of Insurance* to or on behalf of any such company authorizing it to do or continue business in this state while any such percentage or tax remains due and unpaid.

Sec. 2. That original section 77-902, Compiled Statutes of Nebraska, 1929, is repealed.

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* Matter inclosed in brackets, struck out in copy.

[fol. 322] V. J. PAKES called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

1370 Q. Mr. Pakes, will you state your name, residence and business, please?

A. V. J. Pakes, 101 Insurance Building, residence 2511 Country Club Avenue.

1371 Q. What is your business, Mr. Pakes?

A. I am assistant secretary of the Woodmen Of The World Life Insurance Society.

1372 Q. How long have you occupied that position, approximately?

A. Since October, 1935.

1373 Q. How long have you been connected with the Society?

A. About forty-five years.

1374 Q. In its employ during all that time?

A. As an employee in various capacities.

1375 Q. What are your duties with reference to the books and records of the Society?

A. I am in charge of the records and accounting.

1376 Q. You are assistant to Mr. Newberry?

A. That is correct.

1377 Q. Mr. Newberry was here in court day before yesterday, I believe, and since then he has been ill at his home, is that right?

A. That is correct.

1378 Q. Will you examine Exhibit 4, which I now hand you, and state if that is an issue of the Woodmen Of The World magazine that was issued by the Society?

A. It is.

1379 Q. To whom were copies of that to be sent?

A. Copies of this magazine are sent to every member of the Society.

1380 Q. This is dated November, 1942. About when was that sent to the members?

A. That is sent to the members between the 20th and the last day of October, just about a week prior to the month in which it is issued.

1381 Q. The Society also puts out and sends to the members a similar magazine every month of the year?

A. Yes, sir.

1382 Q. How long have they done that?

A. Oh, that has been done ever since the Society has been originated.

1383 Q. Was there any mention made in any of the Woodmen Of The World magazines sent to the members relating to a disposition of the radio station?

A. I don't believe there was.

1384 Q. Or any proposed disposition of the radio station?

A. No, I don't think so.

1385 Q. Has there been since the radio station was leased to the new company?

A. No.

1386 Q. Has there been any mention of that lease in the magazine?

A. No.

1387 Q. What are these red volumes that you have before you?

A. That is a record of the proceedings of the Board of Directors from 1937, 1938, 1939, 1940, 1941 and 1942.

1388 Q. Do those volumes contain also the reports of the president to the Board of Directors of the Society?

A. They do.

1389 Q. Are those reports of the president printed in any way other than as in these books that you have in court?

A. That is right, they are not.

1390 Q. What kind of a record is made of the proceedings of the Sovereign Camp of the Society?

A. Similar records.

1391 Q. Do these books that you have here contain a record of the proceedings of the Sovereign Camp?

A. No. These are records of the Board of Directors meetings.

1392 Q. Have you examined the records of the Sovereign Camp of the Society to determine whether there is any reference in those records to a disposition, either sale or lease, of the radio station?

A. In the Sovereign Camp proceedings?

1393 Q. Yes.

A. No.

1394 Q. Now, Mr. Pakes, do you mean that you have not examined or that there isn't any such record?

[fol. 325] A. I have examined them and there isn't any such record.

1395 Q. Is there any mention of any kind with reference to the radio station being disposed of by lease or sale or otherwise in those proceedings of the Sovereign Camp?

A. Not to my knowledge.

1396 Q. Well, you have examined it, have you not?

A. I have examined it and I haven't found anything.

1397 Q. Now, in the records of the proceedings that you have of the Board of Directors, will you turn to the report of the president with reference to the radio station, in the earliest volume that you have?

A. Any kind of a record or a record with reference to a sale or lease?

1398 Q. Any kind of a record that relates to the station, upon its operation or management.

A. On Page 49.

1399 Q. On Page 49 of the records of the proceedings of the Board of Directors?

A. Of the Woodmen Of The World.

1400 Q. Of the Society, held January and June, 1937, and October, 1937, commencing at Page 49?

A. That is right.

1401 Q. And continuing to Pages 50, 51 and 52?

A. That is correct.

1402 Mr. Stewart: We offer in evidence the pages from the record just referred to, and if Mr. Pakes will supply [fol. 326] a copy, why, then we will not have to put in the original record of the Society, if that is agreeable with opposing counsel.

Mr. Crossman: That is agreeable.

The Court: What is the exhibit number?

1403 Q. The record to which you referred has now been marked by the reporter as Exhibit 16?

A. That is correct.

1404 The Court: You are offering it in evidence?

Mr. Stewart: Yes.

1405 The Court: Substituting a copy?

1406 Mr. Crossman: Is it a report of the president?

1407 Mr. Wells: Report of the president.

1408 Q. Mr. Pakes, that is from a report of the president?

A. That is correct?

1409 Q. And to whom, and when?

A. That was to the Board of Directors in the meeting held January 27th to February 2nd, 1937.

Exhibit No. 16 was received and read in evidence, and made a part hereof, and is attached hereto as follows:

[fol. 327] EXHIBIT "16"

From Minutes of Board of Directors Meeting, 1937 Pages 49-50-51. Extract from President's Report

RADIO

We have just completed the first year in our new location of Radio Station WOW, with the studios now located on the second floor of the Insurance Building and the transmitter and tower located at 56th and Kansas.

Since the installation of the new equipment, which was put into service early in December of 1935, the station has been operating both day and night on 5 K. W., our night time grant of 5 K. W. being on a temporary basis and which has been renewed from month to month by the F. C. C.

The total cost of this new installation including everything, namely, the land and buildings to house the transmitter as well as the installation of the new studios, amounted to, in round figures, slightly less than $130,000.00. During the year a depreciation charge has been set up amounting to about $27,000.00 for the year of 1936, or approximately 1/5th of the total cost. It was deemed necessary to make provisions to amortize the cost of this equipment over a comparatively short period by reason of the fact that with the constant progress and improvement of equipment in radio broadcasting that obsolescence takes place much more rapidly.

While the total financial transactions are reflected in the report of the Accounting Department, no figures are given here. However, it may not be amiss to call attention to the fact that the income from our commercial accounts have been substantial and quite satisfactory.

With the installation of the new equipment it naturally was necessary to very materially enlarge the staff necessary to its operation. This was particularly true with reference to the control operators. This part of the staff has been [fol. 327a] practically doubled by reason of the fact that it

requires the same number of operators at the transmitter as are engaged at the studios, and because of the increased volume of business now being handled by the Station the staff in other branches has been materially augmented. Our total staff at the old studios consisted of eighteen employees; our present staff consists of twenty-nine.

Mr. J. J. Gillin, Jr., as General Manager, has a general supervision over the business of the Station. Mr. Peterson is Promotion Manager, having in charge the handling of all publicity for the Station and also devotes considerable time to sales promotion, as well as editing and preparing the "News Tower", a publication which promises to be of great value to the Station.

Mr. Harry Burke is Promotion Manager and also acts in the capacity of announcer. Foster May, as Assistant Program Manager, is also our News Editor as well as handling the Man-on-the-Street program, in which he specializes. There are four others on the staff as announcers, one of whom also is custodian of the Transcription Department.

Mr. Kotera is Chief Engineer and has complete supervision over the technical end of the Station.

Of the various features in which Radio Station WOW demonstrates its usefulness as a means of public service, it may be pointed out that during a typical week a little over thirty hours of time are devoted to sustaining and educational programs, and news and market reports; an average of four and a half hours per day.

[fol. 327b] Along the lines of charity, we may refer to the Aunt Sally program and Sunshine Club work. This has been a splendid feature and through its operation and the contributions that are sent in by listeners, much charitable work has been made possible and relief furnished to many cases, which upon a thorough investigation have been found worthy.

The Station has also devoted much time in the promotion of other public undertakings, such as the Community Chest and other charitable promotion work.

The Station has been a splendid means of publicity for the Woodmen of the World, not only because of the constant periodic announcements which are made in conformity to the requirements of the F. C. C., but also by reason of special programs, a series of which are now on the air every Sunday evening.

Our news service has been of material value. We have installed a United Press Service, and while this is a rather costly service practically all of this cost has been absorbed by the sale of time in connection with the news service. It has been of material value in enlarging the number of listeners, which is the determining feature of the Station's value as an advertising medium and the production of revenue.

Our affiliation with the red net work of the N. B. C. also is of material value and under the operation of the contract that has been in force for the past year has resulted in increased revenue. At this time we are negotiating for a renewal of contract but these negotiations at this writing have not been completed.

[fol. 327c] Cost of Radio Real Estate and Equipment
December 31, 1936

Radio Real Estate	
Land	$11,479.06
Garage, Dwelling, Plant Building	37,855.63
Drives, Sidewalks, Water	2,650.12
Total Cost	$51,984.81
Less depreciation	12,000.00
Book Value	$39,984.81
Radio Equipment	
Tower	$11,756.97
Insurance Building	14,196.71
Transmitter	38,143.37
	$64,097.05
Office Furniture	13,417.83
Total Cost	$77,514.88
Less depreciation	15,108.40
Book Value	$62,406.48
Total Cost	$129,499.69
Total Book Value	102,391.29

[fol. 328] 1410 Q. What is the next reference to the radio station in the records before you?

A. Page 358.

1411 Q. Now, if I am not mistaken, Mr. Pakes, that is a part of the president's report that was read into the record the other day by Mr. Newberry and was not included as one of the excerpts that he furnished, that was offered in evidence?

A. That is correct.

1412 Q. Is that right?

A. That is right.

1413 Q. Will you make a copy of that portion of Page 358 that contains a part of the record that was not included in the excerpts?

A. Yes. It is in the record now.

1414 Q. It has been read into the record, but if you make a copy of it, we will have it where it can be referred to.

1415 The Court: Identify it.

1416 Mr. Crossman: What is the date? Should be October 25, 1937.

A. That is the meeting on October 25th, to November 1st, 1937.

1417 Mr. Crossman: That will be Exhibit 17 then.

1418 Mr. Stewart: It has been read into the record, but a copy of it has not been included with the other.

1419 Mr. Crossman: The whole of it, verbatim, is already in the record, and in the daily copy.

1420 Q. That is the paper that has been marked Exhibit 17 by the reporter?

[fol. 329] A. That is correct.

1421 Mr. Crossman: Well, so that the Court may understand, this Page 358 is the first part of the report. The reading of the report has already been made by Mr. Stewart, and this page has nothing to do with the lease or sale, but Mr. Stewart had Mr. Newberry read it to the reporter, in the record.

1422 Q. That is a part of the president's report, Exhibit 6, isn't it, Mr. Pakes?

A. That is right; that is correct.

1423 Q. I guess that fixes it up all right. What is the next reference to the radio station in the record?

1424 The Court: How have you got this in the record, this last one? Have you offered it in evidence?

1425 Mr. Stewart: Didn't I offer it?

Mr. Crossman: No.

1426 Mr. Stewart: I will offer Exhibits 16 and 17, both, in case they have not already been offered.

The Court: Received.

Exhibit 16 heretofore received and read in evidence at page 283.

Exhibit No. 17 was received and read in evidence, forms a part hereof, and is made a part hereof as follows:

[fol. 330] EXHIBIT "17"

From Minutes of Board of Directors Meeting—1937. Pages 358-359. Extract from President's Report.

Radio

The operation of Radio Station WOW has been eminently satisfactory during the period covered by this report.

In its primary objectives, which are two-fold, much progress has been made. First, as a means of contact with a large number of our members in keeping the name of our Society before the public daily, it serves as a splendid avenue along with other media in stimulating membership interest.

Secondly, as a means of public need and necessity, it is also functioning in an effective manner along informative, educational and charitable lines. Through our News Department, it brings the news several times daily to its large listening audience. Through its Sunshine Club it brings cheer and comfort to many shut-ins and invalids and by means of the contributions, much charitable work is being done. Through the "Job Clinic" on Sunday nights, more than five hundred unemployed secured permanent work during the past four months. This was a fine achievement and elicited a public testimonial from the Director in charge of the Douglas County Assistance Bureau.

With increasing service, which the station is rendering, there is of necessity an increase in the cost of operation. We have been able, through the sale of time on the air, to meet these costs and to show a net return on our investment.

We have had many problems and new ones are constantly arising. In our efforts to maintain the efficiency of our assigned frequency of 590 KC, we have been forced to defend, at considerable expense, before the F. C. C., our frequency.

The Nebraska Legislature, at its last session, enacted a law regulating the sale of copyrighted music. A. S. C. A. P. has filed an action to enjoin the application of this law, a hearing was held before the federal court, decision has not yet been rendered.

[fol. 330a] The American Federation of Musicians recently made demands on the Broadcasting industry, one of which was that stations employ additional musicians to the amount of five million dollars annually. Negotiations have been entered into and at this writing are still pending. Unless very material modifications can be effected in these demands, it will place a very heavy financial burden on the individual stations, as well as restricting freedom of action in program building.

[fol. 331] 1427 Q. Will you turn to the next record of the Board of Directors that relates to the radio station?

A. All right. These are the minutes of the Board of Directors meeting held March 15th to 26th, 1938, Page 50 to 52.

1428 Q. Mr. Crossman: Pages 50 to 52?

The Witness: There is nothing on 52. Pages 50 and 51.

1429 Q. That record is found on Pages 50 and 51?

A. That is correct.

Mr. Stewart: We offer in evidence Exhibit 18.

The Court: Received.

Exhibit No. 18 was received and read in evidence, made a part hereof, and is in the words and figures following, to-wit:

[fol. 332] EXHIBIT "18"

From Minutes of Board of Directors Meeting—1938. Pages 50-51. Extract from President's Report.

Radio

Radio Broadcasting Station WOW, owned and operated by our Society, has made highly satisfactory progress during the past year.

The gross income from sale of time shows a substantial increase over that of the preceding year.

Through continuous efforts to broaden and improve the service to the people in our area we are constantly increasing the number of listeners. To accomplish this we have added new avenues of service, one of which was the installing of a mobile unit consisting of an automobile truck fully equipped with a complete short wave transmitter unit, also a recording unit, thus enabling us to handle special event- from remote points. This added service has been of great value in quick dissemination of news, as well as originality in program building. We have also added to our news department by increasing the staff, enabling us to cover all local happenings to supplement that of the United Press Service, which provides us first hand with all national and international news. We have also added a Sports Department, giving up to the minute news in sports. This is proving itself a popular feature.

In the field of religious, educational and good will services furnished by Station WOW, we refer briefly to the Church [fol. 332a] of the Air conducted by Rev. R. R. Brown, which was begun when we first went on the air and has been heard every Sunday since that time, the Creighton College series of lectures, the job clinic doing a fine service with splendid results in placing the unemployed in steady jobs, Aunt Sally's "Sunshine Club" bringing cheer into the lives of shut-ins, and substantial relief into many homes.

We are happy to report that our station was awarded the prize by "Variety" as the outstanding station in "Showmanship and Prestige" and express our appreciation to our splendid staff, whose find spirit of loyalty and efficient work has won this distinction.

Because of demands made upon the Broadcasting industry by the American Federation of Musicians to absorb a substantial percentage of unemployment among musicians, and after several months of negotiations, we have contracted with the local unit of the A. F. of M. for the period of two years to employ a Studio Band and Orchestra. This will add an expense of approximately $20,000.00 per

year. It is our hope that some of this may be recovered in the sale of time.

By reasons of other parties making applications to the F. C. C. for license on our frequency, we have been put to quite an expense of litigation in resisting these applications to protect our interests.

As a medium of publicity for the Society, WOW is serving its purpose in a substantial manner. Its call letters being the initials of the Society, it brings both the station and the Society to the attention of the listeners. Under the rules of the F. C. C. this announcement must be made at frequent intervals.

[fol. 332b] In addition to this we have established a series of announcements in which are set forth the objects, the services and the accomplishments of the Society.

[fol. 333] 1431 Q. Which is a part, as I understand it, of the president's report made to that Board of Directors meeting?

A. That is correct.

1432 Q. Will you furnish a copy of that, Mr. Pakes?

A. I will.

1433 Q. So that the original record can be withdrawn then?

A. Yes.

The Court: I understand this is the official record, but copies of that will be put in the record?

Mr. Stewart: Yes; substituted for the original, that is right.

1434 Q. What is the next record you find, Mr. Pakes?

A. 261. This is a record of the minutes of the Board of Directors meeting held November 15th to 21st, inclusive, 1938.

1435 Q. And on what page is that record found?

A. On Pages 261 and 262.

1436 Q. Is that a part of the president's report to that Board of Directors meeting?

A. It is.

1437 Q. Is that the pages the reporter has marked Exhibit 19?

A. That is correct.

1438 Mr. Stewart: We offer in evidence Exhibit 19, and if Mr. Pakes will prepare a copy, then it can be substituted for the original.

The Court: Received.

Exhibit 19 was received and read in evidence, forms a part hereof, and is hereto attached as follows:

[fol. 334] EXHIBIT "19"

From Minutes of Board of Directors Meeting—1938, Pages 261-262. Extract from President's Report:

Radio

Radio Station WOW, operated by our Society, continues to be a valuable medium of keeping our Society in the public eye over a very extensive area. At least once each day an announcement is made calling attention to the Society with pertinent facts of its aims and accomplishments. In the "News Tower", its monthly bulletin which now has a circulation of approximately ten thousand, attention is directed to the Society by timely items.

Daily we make short advertising announcements concerning the Woodmen of the World Life Insurance Society, and our territory of coverage is so great that we, in this respect, reach a number of states such as Arkansas, Oklahoma, Missouri, Kansas, Illinois, Iowa, Nebraska, South Dakota, Minnesota and Wisconsin.

As a public service it is increasingly effective thru its expansion in the News Department. Current news is put on the air almost as soon as it happens and is received from the United Press, and locally from its own news gathering staff. Greater efficiency in this department is being effected by locating the United Press operators in our offices, which necessitates added space, which is now being provided on the ground floor of our building.

[fol. 334a] It takes active part in all charitable and relief movements civically and also through its own "Sunshine Club," which brings comfort and cheer to the bedridden and shut-ins. It continues to lend itself to educational and religious advancement, all of which have been the means of enlarging the great number of listeners as evidenced by the surveys which are made periodically.

From a commercial standpoint it has made satisfactory progress. Practically all of the available time has been sold and contracted for. This also is an indication of general improvement in business conditions.

Recently, with a view of advertising the Woodmen of the World in a more dramatic and extensive way in the states of Nebraska, Iowa, Missouri, Kansas and South Dakota, and to maintain an increasing listener interest, a "Good Will Tour" was arranged in which the staff of Studio artists gave public performances in a number of cities within our area. The success of this venture is evidenced by the large audiences played to. In some places two performances had to be given in one evening in order to accommodate the crowds. At each of these the local camps were notified and announcement made of their presence, thus publicizing the Society in a most effective manner.

From a financial standpoint it has also been quite satisfactory.

Radio Station WOW is recognized as one of the foremost stations in the country and much credit is due Mr. J. J. Gillin, Jr., Manager of the Station and a loyal staff.

[fol. 335] 1439 Q. What is the next record?

A. That is all for 1938.

1440 Q. What is the next record that you have now?

A. The next record is a record of the minutes of the Board of Directors meetings for the months of March, June and October, 1939.

1441 Q. Will you turn to the first reference in that record to the radio station?

A. On Pages 58, 59 and part of 60.

1442 Q. Is that found in the president's report to the Board of Directors meeting held on March 3rd to 13th, 1939?

A. That is correct.

1443 Q. Is that on the page that the reporter has marked Exhibit 20?

A. 58, yes, that is right.

1444 Mr. Stewart: We offer in evidence Exhibit 20, and if Mr. Pakes will furnish a copy to be substituted for the original record, it may be withdrawn.

The Court: Received.

Exhibit 20 received in evidence, same being made a part of this Bill of Exceptions, and being attached hereto as follows:

[fol. 336] EXHIBIT "20"

From Minutes of Board of Directors Meeting—1939. Pages 58-59-60. Extract from President's Report.

Radio Station WOW

We are pleased to report that our Broadcasting Station WOW has again made a very satisfactory record for the year just past. The gross receipts resulting from the sale of time were substantially above the amount shown in the preceding year. Practically all of the available time, other than that portion that we devote to the publicizing of our own Society and to those periods devoted to entertainment, educational and charitable, and similar public services, is substantially contracted for.

It has been our constant effort to increase the efficiency of our radio station and to aid in every way possible to render greater service. This, of course, necessitated the augmenting of our staff, as well as increasing the space occupied by the studios.

We wish particularly to point out to the increased service in our News Department. It was found necessary, in order to make this department function more efficiently, to provide space for the operators of the United Press and to bring under our own roof the facilities and equipment formerly located at some distance from our studios. This is of considerable value because it gives us more direct control in the handling of the news. Of particular value is the fact that thereby we are able to immediately place on the air important news items.

The Special Events Department, which is operated in connection with the News Department, has also done some outstanding work and in several instances has been instrumental in aiding local authorities in tracing and arresting law breakers.

In addition to the News Department, our Sports Department is also proving itself a very popular feature. Our [fol. 336a] daily program of sports gives all of the news in the various field of sport and is presented in a very interesting manner.

In the field of religious activity the Church of the Air, instituted as the first of its kind when this station first went on the air, and which has continuously been conducted by Rev. R. R. Brown as a non-denominational institution, continues in its successful manner. In the near future this program will originate in the Tabernacle, which is now being remodeled and which will contain a properly equipped studio. Under the improved facilities we are sure that this popular program will continue to serve its fine and useful purpose.

The Sunshine Club, a good will feature of this station, continues to enjoy a large circle of listeners and brings into the lives of the invalids and shut-ins a great deal of cheering thoughts and comfort, as well as help in a more substantial manner provided by contributions of interested and sympathetic listeners.

During the past year a Good-Will Tour was inaugurated and the studio staff, together with the studio band gave free public performances in five Nebraska cities and three Iowa cities. These were exceptionally good performances and were highly appreciated by the citizens of the various cities, in fact in several places two performances had to be given because of the inability of all of those desiring to hear of getting into the hall at one time. While this entailed considerable expense, it is of much value in making both our Society and our station popular and of increasing its number of daily listeners.

The addition of the studio band, occasioned by the requirements of the American Federation of Musicians and the constant exacting demands for improved service necessarily has added much to the operating cost of the broadcasting station.

There also remains with us the matter of considerable [fol. 336b] litigation in connection with others trying for our frequency. This, of course, entails considerable expense. There is pending before the Federal Communications Commission the agreement between the American Nations of allocation of frequency. Mexico has not yet become signatory to this agreement so the matter is still pending. It is to be hoped that on the adjustment of the foregoing and the adoption of new rules by the Federal Communications Commission, that Radio Station WOW

may be given permission to operate on a 5 KW both day and night.

[fol. 337] 1445 Q. What is the next record, Mr. Pakes?

A. On Page 319, Paragraph 13.

1446 Q. Is that from the president's report to the Board of Directors meeting held on October 23rd to 28th, 1939?

A. Yes, sir.

1447 Q. Is that the page that the reporter has marked Exhibit 21?

A. That is correct.

1448 Mr. Stewart: We offer in evidence that part of the page that relates to the radio station, being marked Exhibit 21, and if Mr. Pakes will supply a copy, the original will be withdrawn.

The Court: Received.

Exhibit 21 received in evidence, same being made a part of this Bill of Exceptions and being attached hereto as follows:

[fol. 338] EXHIBIT "21"

Copy

From Minutes of Board of Directors Meeting—1939. Page 319, Paragraph 13. Extract from President's Report.

Radio

13. The Radio and our Woodmen Magazine continue to be sources of inspiration and helpfulness in the production of business, by the carrying of news of our activities and advantages of our Society, to the various parts of the nation.

[fol. 339] The Witness: That is all in this book.

1449 Q. What is the next record you find with reference to the radio station, Mr. Pakes?

A. The next record is the minutes of the Board of Directors meetings held in March, June and October, 1940.

1450 Q. Will you turn to any reference to the radio station in that?

A. On Pages 69 and 70.

1451 Q. And that is a part of the president's report to the Board of Directors meeting held from March 6th to 15th, 1940?

A. That is correct.

1452 Q. Which has been marked by the reporter as Exhibit 22?

A. Yes, sir.

1453 Mr. Stewart: We offer in evidence Exhibit 22, and if Mr. Pakes will make a copy, the original may be withdrawn.

The Court: Received.

Exhibit 22 received in evidence, same being made a part of this Bill of Exceptions, being attached hereto as follows:

[fol. 340] EXHIBIT "22"

From Minutes of Board of Directors Meeting—1940. Pages 69-70. *Extracts from President's Report.*

Radio Station WOW

1939 again shows a very successful year in the operation of Radio Station WOW. In the sale of commercial time it has reached a peak; practically all of the available time has been contracted for varying periods, in fact the station was compelled to decline several very substantial accounts because of lack of available time. Radio Station WOW continues to render public service and has cooperated in all civic, as well as national service endeavors.

The Federal Communications Commission has recently granted our station increased power for night-time service, thus Radio Station WOW is now operating on 5 KW both day and night. This has resulted in a decided increase in our night-time coverage, enabling us to reach a much greater number of listeners in our primary area.

Attention is also called to the fact that Mexico has recently become a signatory to the Havana Treaty, which will become effective August 1st. Under this treaty there will be quite a number of re-allocations of frequencies, however, it is our understanding that the frequency of this station will not be disturbed.

The high standard of efficiency in all of the departments and the able management of Mr. J. J. Gillin, Jr. and splen-

did supervision by Director Ruess are deserving of our commendation for the success and high standing of Radio Station WOW.

[fol. 341] 1454 Q. What is the next, Mr. Pakes?

A. Page 314.

1455 Q. That is on Page 314?

A. That is correct.

1456 Q. And that is a part of the report of the president to the Board of Directors at the meeting held on June 3rd to June 8th, 1940?

A. That is correct.

1457 The Court: May I inquire, is it a part or the full report?

The Witness: A part of the report.

1458 Mr. Stewart: Well, as I understand it, it is the full report so far as it relates to the radio station.

The Witness: On the subject of radio. That is the subject.

1459 Q. Commencing on the page identified by the reporter as Exhibit 23?

A. That is correct.

1460 Mr. Stewart: We offer in evidence Exhibit 23, and the original may be withdrawn if Mr. Pakes will substitute a copy.

The Court: Received.

Exhibit 23 received in evidence, same being made a part of this Bill of Exceptions and being attached hereto as follows:

[fol. 342] EXHIBIT "23"

From Minutes of Board of Directors Meeting—1940. Pages 314-315. *Extracts from President's Report.*

Radio

For some time we have been discussing the erection of extra facilities for Radio Station WOW, operating on the amplitude of 590 kc. In fact we had gone so far as to advise the spending of several thousand dollars for this equipment, but we were delayed for first one reason or another, which delay seemed to have been advantageous because of

recent changes in some of the units proposed to be erected. Later improvements have been accepted in radio construction which will render obsolete some of those which we had at first contemplated installing. We are now up to the place where we will probably go forward with the installation, details of which are furnished you by drawings and proposals submitted.

Frequency Modulation known as "FM"

A new system of broadcasting has been developed which has a number of advantages over the amplitude system used at present. This system is called frequency modulation, "FM", and its chief advantages over the present system of amplitude modulation are the greater reduction of static and other forms of interference, much higher fidelity and a reduction of operating costs.

The Federal Communications Commission has set aside the band from 42 megacycles to 50 megacycles for the new system of commercial broadcasting.

Radio receivers in use at present cannot pick up the programs broadcast by this system.

In the east some stations have been built for the handling [fol. 342a] of the "FM". There is one station in Milwaukee which operates at "FM" station and for "FM" receiving sets only. Many radio manufacturers are now building sets with both kinds of reception—for that which is now in use and for the "FM".

It will be necessary for us to make application for the use of the "FM" and to get an assignment, and to be in line for the production of that character of broadcast. We cannot at once get pay for programs over our station. A number of stations have applied for "FM".

On the 20th of May a FCC report was released, consisting of three mimeographs, Nos. 41117 to 41119, in which the commission has announced certain principles of allocations. Wide band broadcasting has been adopted with a channel width of 200 kc and 35 frequencies have been set up at 200 kc intervals, commencing at 43.1 megacycles and concluding at 49.9 megacycles, for the conduct of a regular commercial program service at high frequencies with frequency modulation.

This "FM" is so new to the industry and is subject to so many changes that I will not go further in written explana-

tion at the moment, but we will have a discussion from Mr. Ruess and Mr. Gillen on the subject if you desire.

Our present plan is to make application for a position on the "FM" band. At the moment we are trying to determine whether or not we can use our present set-up by making certain additions and extensions so as to use the "FM" from our own studios and to determine what the cost of such changes would be.

It appears that it will be necessary for us to operate the "FM" to thoroughly cover Omaha with a diameter of seventy miles, and also the 590 kc amplitude in order to reach territory beyond that distance which we now cover.

[fol. 343] 1461 Q. What is the next?

A. 339. Here it is (indicating).

1462 Q. The next is a resolution that is found on Page 339, Mr. Pakes?

A. That is right.

1463 Q. That has been identified by the reporter as Exhibit 24?

A. That is correct.

1464 Q. And is a resolution adopted by the Board of Directors at their meeting held on June 3rd to June 8th, 1940?

A. That is correct.

1465 Mr. Stewart: We offer in evidence Exhibit 24, the original of which may be withdrawn if Mr. Pakes will substitute a copy.

The Court: Received.

Exhibit 24 received in evidence, same being made a part of this Bill of Exceptions, and being attached hereto as follows:

[fol. 344] EXHIBIT "24"

From Minutes of Board of Directors Meeting—1940. Pages 339-340. *Resolution.*

Director Mooney: Mr. President, I desire to offer a Resolution and move its adoption.

"Be it resolved by the Board of Directors of the Woodmen of the World Life Insurance Society, a Fraternal Benefit Society, incorporated and organized under the laws

of the State of Nebraska, that a majority of the members of the Board of Directors, constituting a quorum, are present, as provided in Section 27 (a) of the Constitution, Laws and By-Laws of this Society; and

"That the Hon. De E. Bradshaw, President of the Woodmen of the World Life Insurance Society be, and he is, hereby authorized and directed to have prepared and execute an application to the Federal Communications Commission for High Frequency Broadcast Station Construction Permit, or modification thereof, to be owned and operated solely by the Woodmen of the World Life Insurance Society; and

"That the Hon. Farrar Newberry, Secretary of the Woodmen of the World Life Insurance Society be, and he is hereby authorized and directed to certify a copy of this Resolution and attach same to the application for High Frequency Broadcast Station Construction Permit to the Federal Communications Commission of the United States of America."

Mr. Bradshaw: You have heard the resolution and the motion that it be adopted. Is there a second?

Director Ruess: I second the motion.

President Bradshaw: Are there any remarks? Hearing none, Mr. Secretary, will you please call the roll upon the adoption of this Resolution?

[fol. 344a] Secretary Newberry called the roll, and those present voted as follows:

De B. Bradshaw	President	Yea
T. E. Patterson	Vice President	Yea
Morris Sheppard	Treasurer	Absent
Farrar Newberry	Secretary	Yea
Wm. Ruess	Chairman-Auditors	Yea
W. M. Crawford	Auditor	Yea
R. G. Plunkett	Auditor	Yea
W. C. Braden	Auditor	Yea
Wm. E. Mooney	Auditor	Yea
R. E. Miller	Auditor	Yea
Henry E. Klugh	Auditor	Yea
Charles A. Hines	Escort	Yea
Sterling C. Holston	Watchman	Yea
T. Alex Heise	Sentry	Yea

President Bradshaw: All the members of the Board being present and voting, except Senator Sheppard, Treasurer, the vote upon the adoption of the resolution was thirteen "yeas," "nays" none, and the motion is adopted.

[fol. 345] The Witness: That is all.

1466 Q. What is the next record of the Board of Directors that relates to the radio station?

A. Minutes of the meeting of the Board of Directors held in 1940, and there is more than one meeting in there.

1467 Q. That is a part of the report of the president made to the Board of Directors at their meeting held February 27th to March 9th, 194——

A. 1941.

1468 The Court: What year is that?

1469 Q. It says 1941, but I see that the other dates there seem to be 1942.

A. It is 1942. It must be 1942. It is 1942, I see all the way through. Our dates are marked under here (indicating).

1470 Q. It is 1942?

A. That is correct.

1471 Q. Is that right?

A. That is correct.

1472 Q. And that is the page that the reporter has marked as Exhibit 25?

A. That is correct.

1473 Mr. Stewart: We offer in evidence Exhibit 25, which may be withdrawn if Mr. Pakes substitutes a copy.

The Court: Received.

Exhibit 25 received in evidence, being made a part of this Bill of Exceptions and attached hereto as follows:

[fol. 346] EXHIBIT "25"

From Minutes of Board of Directors Meeting—1942. Pages 49-50. *Extract from President's Report.*

Radio Department

At the close of 1941 our Radio Station finished its most successful year from the commercial standpoint. The gross volume of income showed a substantial increase over the previous year, resulting also in a greater surplus for the year. At the same time a great deal of our time on the air was devoted to public service by reason of war activities, both in bringing the news from the battle fronts as well

as publicizing the needs of the armed service in all of its branches.

In December the final deduction in the amortization of the cost of the Radio Equipment and Studios was made, so that from now on most of the expenditures for equipment, will be mainly for replacement and maintenance.

It will be well to direct your attention to the state of uncertainty the broadcasting industry finds itself in. As you well know, the F. C. C. in May of last year formulated new rules affecting the granting of licenses to broadcasting stations which will seriously hamper the sale of commercial time and result in a very material loss of revenue. The effective date has been postponed from time to time and at the present of writing it is a matter of speculation as to the final outcome.

[fol. 347] 1472 Q. The next one.

A. The next one is this (indicating). That is the date on which this meeting was held.

1475 Q. What is that page, the last one?

A. The last page is Page 49. The next page is this (indicating), 154; that starts right in there (indicating).

1476 Q. There are some other references to the radio station in the 1942 record, but those have already been offered and received in evidence, haven't they?

A. That is right; that is correct.

1477 Q. Is there any other report made by the president other than to the Board of Directors? Does he also make one to the Sovereign Camp?

A. Yes, he does.

1478 Q. Is that printed in pamphlet form?

A. The report of the president is printed in pamphlet form, yes.

1479 Q. Is there anything in any of these reports of the president to the Sovereign Camp that relates to a sale or disposition of the radio station?

A. No.

1480 Q. Do you have charge of the accounts of the Society?

A. Yes; they are under my supervision.

1481 Q. In the answer that was filed in the case by the Society certain figures are given as the receipts for the radio station, less commissions. Do you have a record of what those commissions are?

[fol. 348] A. Oh, yes.

1482 Q. To whom were those commissions paid?

A. Those commissions are paid to the agents that secure those advertisements.

1483 Q. Did the Society receive the money and then pay it out to the agents; is that the way it was handled?

A. In some cases, yes, but the larger accounts are usually with a deduction of the commissions; in other words, the check comes in in net.

1484 Q. So that I can get that in my mind, just take an example, some customer of the station, you mean that General Foods, for instance, will bring into your station—— (interrupted)

A. I could not say as to General Foods, but some of the larger agents, advertising agents, they send the money in in net after they have deducted their commission or retained their commission.

1485 Q. Well, is that a commission that is paid by the Society to that agency?

A. It would be paid if they remitted to us in gross, yes.

1486 Q. Does that agency represent the Society or the advertiser?

A. Well, the agency represents—I couldn't tell you exactly about that, but I should judge it represents the advertiser. We just contract with the agent.

1487 Q. What would be the basis on which the Society would be paying the representative of the advertiser a commission?

A. Oh, the basis—I couldn't tell you what the basis is: [fol. 349] that is a matter of contract arrangement between the radio management and the advertiser or agent.

1488 Q. You have a record to whom those commissions were paid?

A. Oh, yes, everything, surely.

1489 Q. Were any of them paid to anyone connected with the Society?

A. Oh, no.

1490 Q. Were they all paid to the advertising agency?

A. That is right.

1491 Q. As I understand it, in some instances the Society receives that amount and then pays it to the advertising agency, and then in other instances the advertising agency simply deducts it before paying it to the Society?

A. That is correct.

1492 Q. Do you have a record of the receipts and disbursements of the station for the year 1942?

A. Yes.

1493 Q. You have it with you?

A. I think I have. That is it (indicating). You have a copy of the same thing, except that item.

Mr. Stewart: I think that is the same as is in the answer.

The Witness: It is.

Mr. Wells: It is the same thing.

1494 Q. Do you have the figures of receipts and disbursements in 1943?

Mr. Wells: 1943?

A. Yes, I have the disbursements for 1943.

[fol. 350] 1495 Mr. Crossman: Mr. Stewart, is this on any paper identified?

Mr. Stewart: No.

The Witness: I haven't got the receipts. I've got the disbursements in there; that is, for the first fourteen days of 1943.

1496 Q. Could you get those figures of the receipts, Mr. Pakes?

A. Yes, indeed.

1497 Q. I wonder if there is somebody else that could get that for you while you are on the stand; is there anyone else in the room that has it?

1498 Mr. Wells: Pardon me. You wanted it for fourteen days, didn't you?

Mr. Stewart: Yes.

1499 Q. Does he have them here or would he have to go down?

A. He has to get it.

1500 Mr. Stewart: Do you have any cross examination up to this matter?

Mr. Wells: Yes.

Mr. Stewart: That you want to go ahead with, if you desire, until that information is furnished.

Cross-examination.

By Mr. Wells:

1501 Q. Mr. Pakes, Mr. Stewart asked you about the income and expenditures of 1936, Radio Station WOW. Will [fol. 351] you please state what the gross receipts were in 1936?

Mr. Stewart: That is objected to. I don't believe I asked him about the receipts in 1936.

The Court: I don't recall.

Mr. Wells: They are marked papers that he used, and I don't know how they got there.

Mr. Stewart: I called for the figures for 1942.

Mr. Wells: Not 1936?

Mr. Stewart: No. You are mistaken. I just asked for figures for 1942, and he produced a paper that has 1942 on it, and has some other years too. I don't have any objection to your putting it in, if you want to, except I did not ask for it.

1502 Q. What were the gross receipts in 1936?

A. The receipts for 1936, $280,066.75.

1503 Q. What was the net operating income?

A. Net operating income was $131,337.34.

1504 Q. Do you know what the net income was reported to the Federal Communications Commission under its rules and regulations?

A. $117,968.02.

Mr. Wells: I don't want the details about it, if your Honor please, but I want to ask him what the record of the proceedings of the Board of Directors shows as to the attendance of the members of the Board of Directors in each of those meetings which Mr. Stewart introduced, and the action on each of those resolutions.

[fol. 352] The Court: As shown by the minutes?

Mr. Wells: As shown in the minutes, covering each action from 1937 to 1942, inclusive.

Mr. Crossman: Do you mind if I help you, Mr. Pakes?

The Witness: Yes. I think I can give it.

Mr. Crossman: I have these pages, unless you have them. 1937, Page 49 to start with.

1505 Q. At the time the president made his report which has been introduced in the record, how many members of the Board of Directors were present at that meeting?

A. Thirteen.

1506 Q. If any were absent, which one or more was it?

A. W. M. Crawford was absent, and R. E. Miller was absent.

1507 Q. And the other members were present?

A. That is correct. Wait a minute. And Morris Shepard was absent.

1508 Mr. Massey: What exhibit is that—16?

The Witness: 16.

1509 Q. Now, the next one, Exhibit 17.

Mr. Crossman: That is Page 358 of 1937.

1510 Q. That Exhibit 17 is also a report of the president. How many were present and how many were absent of the members of the Board of Directors?

A. Thirteen present and one absent.

1511 Q. Who was that?

[fol. 353] A. Morris Shepard.

1512 Q. What was the action of the Board on that report at that time?

A. Unanimous.

1513 Mr. Crossman: May I ask a question, Mr. Wells?

Mr. Wells: Yes, sir.

By Mr. Crossman:

1514 Q. It appears in here that there are fourteen directors, now, but in the previous one it showed apparently sixteen. Can we check that?

A. Yes. Two non-voting members.

By Mr. Crossman:

1515 Q. Of the Board?

A. That is right.

Mr. Wells: A doctor and attorney.

1516 Q. The next record that was introduced.

1517 Mr. Crossman: That is 1938, at Page 50.

A. That is on Page 492.

Mr. Stewart: That is something that was put in before.

1518 Q. It appears that on Page 492 of the proceedings of the Board of Directors of 1937 there was a resolution adopted, which has heretofore been introduced by Mr. Stewart in the record. How many members of the Board were present at the time that resolution was considered, and what was their action?

Mr. Massey: Exhibit 5, I believe.

A. Thirteen present and one absent.

1519 Q. What was the action of the Board on that resolution?

A. Unanimously adopted.

[fol. 354] 1520 Mr. Massey: Is that Exhibit 5?

The Witness: That was exhibit — that was introduced yesterday or day before yesterday.

1521 Mr. Crossman: That was the resolution of the Board of Directors on October 30, 1937.

The Witness: That is right.

1522 Mr. Crossman: That is Exhibit 5.

1523 Q. What is the next one?

Mr. Crossman: That is 1938, Mr. Pakes, Page 50.

A. Page 50; that is the record.

1524 Q. At that meeting of the Board how many members were present, and if anyone was absent, who was it?

A. Fourteen present.

1525 Q. That is all of them?

A. That is all of them.

1526 Q. On the president's report, what was the action of the Board?

A. Adopted.

1527 Q. By——(interrupted)

A. Unanimous vote.

1528 Q. What was the next one?

1529 Mr. Massey: Is that Exhibit 18?

Mr. Wells: Exhibit 18.

A. Exhibit 18.

1530 Q. I will go to Exhibit 19.

1531 Mr. Crossman: On Page 261.

A. Exhibit 19.

[fol. 355] 1532 Q. How many members of the Board were present at that meeting?

A. Fourteen.

1533 Q. All the members?

A. All present.

1534 Q. What was the action of the Board on that report?

A. Adopted unanimously.

1535 Q. The next one, Exhibit 20.

1536 Mr. Crossman: That was in 1939, at Page 58.

Mr. Wells: No.

Mr. Massey: No. This is in 1938.

A. Yes, it is.

1537 Mr. Crossman: You've got Page 261 yet; that is the one Mr. Wells just had, Page 261.

The Witness: Yes, that is Exhibit 19.

1538 Mr. Crossman: That is right.

Mr. Massey: No. 20.

1539 Mr. Crossman: The next is 1939, at Page 58.

The Witness: Exhibit 20.

1540 Q. How many members of the Board were present at the time Exhibit 20 was considered by the Board?

A. Twelve present.

1541 Q. What two members were absent?

A. Shepard and Holston.

1542 Q. What was the action of the Board on that report?

A. Unanimously adopted.

1543 Q. Exhibit 21.

[fol. 356] 1544 Mr. Crossman: That is Page 317, and 319.

Mr. Wells: That is right.

A. Yes, Exhibit 21.

1545 Q. How many members of the Board were present when that was under consideration by the Board?

A. Eleven.

1546 Q. Who was absent?

A. T. E. Patterson, Morris Shepard and W. M. Crawford.

1547 Q. What was the action of the Board on that report?

A. Unanimously adopted.

1548 Q. Exhibit 22.

1549 Mr. Crossman: 1940, at Page 69.

1550 Mr. Stewart: Mr. Wells, we would be willing to stipulate that the vote was unanimous on each of those reports and resolutions, in favor of them.

1551 The Court: That would not be a fact, because it shows several were not there.

1552 Mr. Stewart: Well, unanimous of those present.

1553 Mr. Massey: We cannot stipulate on who was present until we get it in the record.

1554 Mr. Wells: I am nearly through, anyhow.

1555 Q. Exhibit 22. How many members of the Board were present at that meeting?

A. Twelve.

1556 Q. Who was absent?

A. Morris Shepard and Farrar Newberry.

[fol. 357] 1557 Q. What was the action of the Board on that report?

A. Unanimously adopted.

1558 Q. Exhibit 23.

Mr. Crossman: Page 314.

A. Exhibit 23, Page 314.

1559 Q. How many members of the Board were present at that meeting?

A. Thirteen.

1560 Q. Who was absent?

A. Morris Shepard.

1561 Q. What was the action of the Board on that Exhibit 23?

A. Unanimously adopted.

1562 Q. Exhibit 24.

Mr. Crossman: Page 339.

A. Exhibit 24.

1563 Q. And what was that, a report or resolution?

A. That was a resolution.

1564 Q. How many were present at that meeting?

A. Thirteen.

1565 Q. What was the action of the Board?

A. Unanimously adopted.

1566 Mr. Crossman: The next one is Exhibit 25, Page 339.

The Witness: We just had it.

1567 The Court: You didn't say who was absent.
The Witness. Absent, Morris Shepard.

1568 Q. The next one, Exhibit 25.

Mr. Massey: That is in 1942, February 25th.
[fol. 358] Mr. Crossman: I would say Page 49.

A. Yes, sir, Exhibit 25.
1569 Q. Exhibit 25 is a report of the president. Who was present at that meeting?
A. Fourteen.
1570 Q. All of them present?
A. All present.
1571 Q. What was the action of the Board?
A. Report adopted unanimously.

Mr. Crossman: We should go back to some that have not been covered, some that were put in yesterday, March 5, 1942.

1572 Q. Turn to the proceedings on March 5, 1942.
A. Yes, sir.
1573 Q. Which has been introduced by the plaintiff heretofore. Who was present at that meeting?
A. All present.
1574 Q. What was the action of the Board on the resolution, adoption of the report at that meeting?

1575 Mr. Massey: Exhibit 7, isn't it?

A. There was a resolution on March 5th?

1576 Mr. Massey: March 5th was a report of the president. Minutes of the president's remarks in executive session.
The Witness: Is that Exhibit 25?
1577 Mr. Massey: No. Exhibit 7.
[fol. 359] 1578 Mr. Crossman: It is not shown in your record.
The Witness: That would not be marked on here?
1579 Mr. Crossman: No. That is right, it doesn't show there, but it is Exhibit 7.
The Witness: What is the nature of it; report or resolution?
1580 Mr. Crossman: President's report.

1581 Mr. Massey: I have a notation that it is the minutes of the president's remarks made in executive session.

1528 Mr. Crossman: On Page 49, which is marked Exhibit 25.

1583 Mr. Massey: Have you got March 5th?

The Witness: That is what he is calling for.

1584 Q. That was merely some remarks by the president in executive session, and it does not require any action of the Board, therefore I pass that up.

— What is the next one?

1585 Mr. Crossman: Next is Exhibit 8, August 25, 1942, report of the president.

A. Is that a resolution?

1586 Mr. Crossman: That is a report of the president.

The Witness: Report of the president?

1587 Mr. Crossman: On August 26, 1942.

1588 Q. That report of the president on August 25, 1942 was acted upon by the Board of Directors on August 31, [fol. 360] 1942. Will you turn to the action of the Board on August the 27th?

A. 27th. There it is (indicating).

1589 Q. August 27, 1942. That appears to be from the minutes of the report of the committee which has been introduced in the record, and resolution following introduced by Mr. Hines. And what was the action of the Board on that resolution?

A. Unanimously adopted.

1590 Q. How many were at that meeting?

A. Fourteen.

1591 Q. All present?

A. All present.

1592 Mr. Wells: That is all I want to ask him.

1593 Mr. Stewart: That is all now, Mr. Pakes.

1594 Mr. Wells: Wait a minute. I think Mr. Stewart asked about the receipts of Radio Station WOW, gross receipts from January 1st to the 14th, 1943. But he does not seem to want it, but I believe I will ask you what the gross receipts were for the first fourteen days in January, 1943.

The Witness: The first fourteen days of January, 1943?

1595 Mr. Wells: Yes.

The Witness: $25,874.21.

Redirect examination.

By Mr. Stewart:

1596 Q. Mr. Pakes, you don't have any original records [fol. 361] that show those receipts, do you?

A. Not here.

1597 Q. Someone has handed you a memoranda that shows that figure?

A. Yes.

1598 Mr. Wells: Does he want the original record?

1599 Mr. Crossman: You called for the copy. Now, are you not satisfied with it?

1600 Mr. Stewart: A copy?

1601 Mr. Crossman: You called for the information.

1602 Mr. Stewart: I did not call for a copy.

1603 Mr. Wells: Well, he is not satisfied.

1604 Mr. Crossman: Did you call for the record, Mr. Stewart?

1605 Mr. Steward: I don't think so.

1606 Mr. Crossman: Mr. Pakes, will you go and get the record?

The Witness: Yes.

1607 Mr. Wells: Mr. Stewart is not satisfied with it.

1608 Mr. Crossman: Bring the record.

The Witness: All right, sir.

1609 Mr. Wells: Let us get that right.

1610 Mr. Stewart: I have not made any statement about I am not satisfied about your information. I am just making the statement that I didn't say that I was dissatisfied with the record.

1611 Mr. Crossman: Do you now require the original rec- [fol. 362] ords to be brought out?

Mr. Stewart: Not as far as I am concerned.

Witness excused.

M. M. MEYERS called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

1612 Q. Will you state your name, business and residence, Mr. Meyers?

A. M. M. Meyers, 675 North 57th Avenue, investment broker.

1613 Q. What is your business, Mr. Meyers?

A. I deal in securities, revenues and municipal bonds.

1614 Q. Are you a representative of some company that deals in bonds and other securities?

A. I am.

1615 Q. What company?

A. Well, it is a syndicate consisting of Stranahan, Harris & Company, John Nuveen & Company, and A. C. Allen.

1616 Q. Are they what you call investment bankers?

A. That is correct.

[fol. 363] 1617 Q. Have you had any training or experience in the broadcasting business?

A. No, I have not.

1618 Q. Are you acquainted with Mr. Bradshaw, president of the Woodmen Of The World?

A. I am.

1619 Q. How long have you known him, approximately?

A. About 1924 or 1925, in there somewhere.

1620 Q. Have you had any business transactions with Mr. Bradshaw?

A. Not individually, as such.

1621 Q. Have you had with the Society?

A. I have.

1622 Q. What has been the nature of those transactions?

A. Selling them bonds and securities.

1623 Q. How long have you been engaged in selling them bonds, approximately?

A. Since 1925.

1624 Q. Is the Society your largest customer?

A. It is.

1625 Q. Are you acquainted with John Gillin?

A. I am.

1626 Q. About how long have you known him?

A. Since about around 1930, 1931.

1627 Q. Have you had any business transactions with Mr. Gillin prior to this new company?

A. No, I have not.

[fol. 364] 1628 Q. Your acquaintance has been a social acquaintance?

A. No. It has been one of civic, Chamber of Commerce together with civic work around the city.

1629 Q. You said that you had no business transactions with Mr. Bradshaw personally?

A. Not as an individual, no, sir.

1630 Q. Your personal acquaintance with him has been merely that of friendship?

A. It has.

1631 Q. What connection, if any, do you have with the Consumers Public Power District in Nebraska?

A. I have no connection with the Consumers as the Consumers Public Power District. I represent this syndicate in the purchase of the bonds of the Consumers Public Power District.

1632 Q. And that syndicate that you represent handles all of the bonds issued by the Consumers in connection with its acquisition of power facilities here in Nebraska?

A. I believe they have, yes.

1633 Q. And are those the properties that Mr. Guy Myers acquired for the Consumers?

A. Yes, sir.

1634 Q. And the amount of those bonds, I believe, was approximately forty million dollars?

A. I believe it was forty-four million, right around that figure.

1635 Q. Is that syndicate interested in the bonds that will [fol. 365] be issued by the Consumers if it acquires the facilities of the Nebraska Power Company here in Omaha?

Mr. Crossman: I will make the objection as incompetent, immaterial, and let the objection stand to the whole line of testimony.

The Court: He may answer.

(Question read.)

A. I would say if as and when they acquire it, yes, sir.

1636 Q. Well, they are interested in acquiring them, if they can, is that correct?

A. I don't quite get your question.

1637 Q. Well, is this syndicate desirous of acquiring such bonds if they are issued?

A. If the bonds are available, yes.

1638 Q. Yes. And if the syndicate acquires them, then it would be a part of your business to dispose of those bonds?

A. Well, not so much in disposing of the bonds, but in purchasing them. But if they do get the bonds, I hope, naturally, to participate in selling them.

1639 Q. Who first mentioned to you the proposed leasing or sale of Radio Station WOW?

A. Mr. Bradshaw.

1640 Q. Can you state about when it was and where it was?

A. In his office, I would say somewhere in the early part of the spring last year, May or June.

1641 Q. What did Mr. Bradshaw say with reference to [fol. 366] the transaction at that time?

A. They were going to have to sell the station, and he thought that I might be interested in it.

1642 Q. Interested in what way, Mr. Meyers?

A. In purchasing the station or whatever happened to be worked out.

1643 Q. Did he tell you at that time that Mr. Gillin was getting together a group to acquire the station?

A. I think that is right, yes.

1644 Q. When was the station again mentioned to you?

A. Oh, sometime later than that I talked to Mr. Gillin about it.

1645 Q. About when?

A. Oh, it was sometime after that; I would say around thirty days, along in there somewhere.

1646 Q. Did Mr. Bradshaw say whether it was to be a sale or lease of the station?

A. I don't recall.

1647 Q. Did Mr. Gillin say whether it was to be a sale or lease of the station?

A. I don't think he did at that time. He didn't know, I think.

1648 Q. When was the next conversation with anyone concerning the station?

A. As I recall it, it was sometime in October, first part of October.

1649 Q. And with whom was that conversation, and where did it occur?

[fol. 367] A. In Mr. Bradshaw's office, and as I recall it, the rest of the group that were interested in the transaction were there.

1650 Q. That is, do you mean the incorporators and stockholders in the new company?

A. That is it.

1651 Q. Was that the first meeting of the incorporators of the company?

A. I believe it was.

1652 Q. Where was it held?

A. In the Woodmen Of The World, Mr. Bradshaw's office.

1653 Q. Were all of the incorporators there?

A. I think they were.

1654 Q. And was Mr. Bradshaw there?

A. He was.

1655 Q. Up to that time did you know whether the new company was contemplating acquiring a lease or going to buy the station?

A. No, sir, I did not.

1656 Q. Did you agree that day to take stock in the new company?

A. I think that was the time I did, yes.

1657 Q. In what amount?

A. $5,000.

1658 Q. How many shares of stock did you receive for that?

A. Fifty shares of Class A stock and fifty shares of common stock.

1659 Q. How much did you pay for it?

A. $5,000.

1660 Q. Did you borrow a part of that money?

[fol. 368] A. I did.

1661 Q. Why did you buy that stock?

A. Well, because I thought it would be a good investment.

1662 Q. What office do you hold in the new company?

A. I am secretary.

1663 Q. You have custody of the minute book of the corporation?

A. I do.

1664 Q. You have that with you here?

A. I do.

1665 Q. Was there a resolution adopted by the Board of Directors fixing the price at which the stock should be issued; if there was, will you turn to it?

A. Do you mean the amount of stock to be issued?

1666 Q. No. The price to be paid for it.

A. Here it is (indicating).

1667 Q. Have you found the resolution, Mr. Meyers?

A. I have.

1668 Q. At the meeting of what date?

A. The 3rd day of October, 1942.

1669 Q. Of the Board of Directors of the company?

A. First meeting of th Board of Directors of Radio Station WOW, Inc.

1670 Q. Mr. Meyers, is that the resolution in the record which the reporter has marked Exhibit 26?

A. Yes, sir.

1671 Mr. Stewart: We offer in evidence the resolution [fol. 369] found in Exhibit 26, and if Mr. Meyers will substitute a copy of that, why, the original record may be withdrawn.

Mr. Crossman: No objection.

The Court: Received.

1672 Mr. Stewart: The resolution reads: "Be it further resolved that the corporation Radio Station WOW, Inc. issue forthwith 750 shares of preferred stock Class A, and 250 shares of preferred stock Class B, of a par value of $1.00 per share. The 750 shares of preferred stock Class A to be issued for a consideration or price of $99.00 per share, and the 250 shares of preferred stock Class B issued for a consideration or price of $1.00 per share, and that Radio Station WOW, Inc. issue 1000 shares of common stock of a par value of $1.00 per share."

Mr. Crossman: Is it necessary to make a copy now that you have read it into the record?

Mr. Stewart: I think it would be a little more convenient to us as an exhibit.

Mr. Massey: You want a copy of that, then?

Mr. Stewart: Yes.

Copy of Exhibit 26 received in evidence, same being made a part of this Bill of Exceptions and being attached hereto as follows:

[fol. 370] EXHIBIT "26"

Be it further resolved, that the corporation, Radio Station WOW., Inc., issue forthwith 750 shares of Preferred Stock Class A and 250 shares of Preferred Stock Class B of a par value of $1.00 per share; the 750 shares of Preferred Stock Class A to be issued for the consideration or price of Ninety-nine Dollars ($99.00) per share, and 250 shares of Preferred Stock Class B to be issued for the consideration or price of One Dollar ($1.00) per share. And that Radio Station WOW., Inc., issue 1000 shares of Common Stock of a par value of $1.00 per share. The foregoing resolution, upon being put to a vote, was unanimously adopted.

No further business coming before the meeting, on motion duly made and seconded, the meeting adjourned.

(Signed) Francis P. Matthews, Secretary of the Meeting.

[fol. 371] 1673 Q. Mr. Meyers, was the common stock paid for on the basis of $1.00 a share?

A. Yes.

1674 Q. Do you have the account books of the company in your custody, Mr. Meyers?

A. No, sir; I do not.

1675 Q. Do you know who keeps or has charge of those records?

A. Well, the treasurer, I think. The books are kept in the radio station.

Mr. Stewart: I believe that is all.

Mr. Crossman: I have no cross examination. We will have some direct examination.

Mr. Stewart: That is all, Mr. Meyers.

Witness Excused.

Mr. Crossman: May I ask Mr. Gillin to take the stand for a moment to complete his cross examination.

JOHN J. GILLIN, JR. a witness heretofore called and duly sworn, recalled as a witness, and testified further as follows:

Further cross-examination.

By Mr. Crossman:

1676 Q. Mr. Gillin, just before you left the stand Mr. Stewart asked you for the names of the two associates of Mr. Payton of Breed, Abbott & Morgan with whom you conferred when you were in New York about these various [fol. 372] matters. Do you now have that information?

A. Yes, sir.

1677 Q. And did you telephone to New York and get the information for Mr. Stewart?

A. I wired Mr. Payton and Mr. Payton called me back by long distance telephone right here a few minutes ago.

1678 Q. So in order to get the information for Mr. Stewart you did that and you now have the names of these two gentlemen, have you?

A. Yes, sir.

1679 Q. What are their names?

A. George H. Brown and Charles R. Maxwell, Jr.

Mr. Crossman: That is all.

1680 Mr. Stewart: Would you like to have me pay for that phone call?

1681 Mr. Crossman: Yes; I think you should, and the wire too.

1682 Mr. Stewart: That doesn't seem unfair.

1683 Q. Is there anything else that Mr. Stewart has asked you for that we have not produced or is not here in the court room?

A. He asked for the records kept in the new corporation. At the present time, they are here.

1684 Q. Mr. Meyers produced the corporate records.

A. Well, I mean by that the bookkeeping record.

1685 Q. The book record?

[fol. 373] A. Yes.

1686 Q. He asked you for the books of account, is that right?

A. Yes, sir.

1687 Q. And are they now in the court room?

A. Yes, sir.

1688 Q. Are you conscious of anything else that Mr. Stewart has asked you for that we have not produced?

A. I believe that is all, isn't it, John?

Redirect examination.

By Mr. Stewart:

1689 Q. What is the name of that young man that had the books?

A. Mr. Larson.

Witness Excused.

[fol. 374] C. A. Larson called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Stewart:

1690 Q. State your name, residence and business, please.

A. C. A. Larson, 326 North 36th Avenue, Omaha, Nebraska. I am now acting as bookkeeper for the Radio Station WOW, Inc.

1691 Q. How long have you been serving in that position, Mr. Larson?

A. Since the origin, or since the institution of the new corporation.

1692 Q. And about what date was that?

A. January the 15th, 1943.

1693 Q. Prior to that time, what was your business?

A. I was acting as the auditor for the radio station while it was being handled by the Woodmen of the World Life Insurance Society.

1694 Q. How long had you worked for the Society?

A. Since 1935.

1695 Q. Do you have with you the original books and records of the Radio Station WOW, Inc.?

A. I have a record which we have kept up to this time. They are not a complete set of books.

1696 Q. You have produced here—well, what do you call this record that you produced?

A. This is just a listing of the receipts and the expenditures that have been made during the time that we have [fol. 375] been in operation.

1697 Q. Is that the only book or record that the company has?

A. Yes, sir.

1698 Q. It does not have any ledger?

A. Not yet.

1699 Q. Does it have any cash book?

A. Just what is shown here.

1700 Q. Just this record here. Will you turn to the capital account of the company?

A. I do not have a record of the capital account here.

1701 Q. You have one at your office?

A. I have it; yes, sir.

1702 Q. What other records do you have at your office that are not with you, Mr. Larson?

A. Well, that I wouldn't know.

1703 Q. You say you have no ledger?

A. We have no ledger, no.

1704 Q. Have you made any entries of any kind other than in this record that you produced here in court?

A. No, I have not.

1705 Q. Had you made a record in the capital account?

A. Well, the only record I have in the capital account is the amount of money which is on deposit in the bank.

1706 Q. Does the record show at what the assets are carried on the books of the company?

A. No.

[fol. 376] 1707 Q. Hasn't there ever been any book set up showing the value of the assets of the company?

A. Well, I might explain this situation. We are in the process of installing a machine bookkeeping system; we are waiting for the forms to come back from the printer so that we can start this system out right on this machine, and therefore there have been no ledger forms kept, no account forms kept, with the exception of the listing of the daily transactions by the radio station. After we get these new forms and the new machine installed, the books will be opened and will be brought up to date.

1708 Q. Well, does the record which you have here show the contribution of capital by the different stockholders?

A. No.

1709 Q. Will you show me the first entry in the record that you have?

A. This happens to be the check register showing the check number, the name drawn to, just a memorandum explaining the amount and the distribution.

1710 Q. Mr. Larson, you have a record showing the total receipts of the station for the month of January, 1943?

A. I do.

1711 Q. And that shows the receipts by the Woodmen of the World Life Insurance Society, and also the receipts by the new company?

A. That is right; yes, sir.

Mr. Massey: It shows an allocation to the two of the receipts?

[fol. 377] The Witness: That is right.

1712 Q. What is the amount of those receipts for the month of January, 1943?

1713 Mr. Crossman: May I ask to have the question read?

(Question read.)

1714 Mr. Crossman: Are you asking for the entire month of January regardless of possession and regardless of allocation; is that what you are asking for?

Mr. Stewart: That is right.

A. That is the receipts received in January?

1715 Q. That is right.

A. That is January time, money received in February.

1716 Q. The receipts for January.

A. Here is the receipts for January (indicating). The total receipts for both the Society and WOW, Inc. are $63,538.66.

1717 Q. Now, you don't have any record here, I believe you said, that shows—or there aren't any records yet that show the capital set-up?

A. That is right.

1718 Q. You do know what the capital of the assets of the company are going to be put on the books at?

A. No, I do not.

1719 Q. Who is the accountant for the company, do you know?

A. Well, I would be acting as accountant.

1720 Q. Well, I mean is there some other accountant, independent accountant outside of the office that represents the new company?

[fol. 378] A. Oh, Mr. Allison, I believe is.

Cross-examination.

By Mr. Massey:

1721 Q. Mr. Larson, have you and Mr. Gillin been in negotiation with anyone with reference to the installation of a bookkeeping system?

A. Yes, we have.

1722 Q. With whom?

A. Remington Rand.

1723 Q. Where is there office?

A. In the Woodmen of the World Building.

1724 Q. And whom did you negotiate with down there?

A. Mr. Kerr.

1725 Q. What type of system do you contemplate installing?

A. Complete machine bookkeeping system.

1726 Q. Can you explain to the Court briefly how that system will work? Now, bear in mind that the Court keeps a set of books like any lawyer; he has got a check register and he makes entries in his distribution record. Now, explain to the Court how these machines operate.

A. Well, these machines will eliminate various operations by doing the same job all at one time. In other words, we will be able to post from our daily log each day to the customer's account ledger card, the invoices proper with the copies necessary, and the daily log journal to channels [fol. 379] through which we have to carry it. Then we will be able to make our voucher record, the voucher itself, and the distribution of the voucher all in one operation, and we will be able to keep our ledger also on this machine.

1727 Q. With the exception of the capital account, do you have all of the information in that columnar pad there that will be required when the machine is available?

A. Yes, sir.

1728 Q. And will the information therein contained, when transferred to these cards that the machine handles, con-

tain a complete and full record as though you had the ledger and journal right now?

A. That it will.

1729 Q. When do you expect to get that machine?

A. The machine is already in Omaha. We are waiting for the printing, which will be completed within the next two weeks.

1730 Q. Where is that printing being done?

A. The printing is being done at the Omaha Printing Company.

1731 Q. When do you say it will be ready?

A. In about the next two weeks.

1732 Q. Have you had an estimate of the cost of this system?

A. Yes, we have.

1733 Q. How much?

A. About $1,200.

1734 Q. How long ago did you order the machine?

A. We definitely placed that order about thirty days ago.

[fol. 380] 1735 Mr. Massey: Let the record show that I hand Mr. Stewart a copy of Exhibit 26, which he requested.

1736 Mr. Stewart: Thank you. That is to go in the record in place of the original.

Redirect examination.

By Mr. Stewart:

1737 Q. Mr. Larson, do you also have the figures showing the receipts from the radio station for the month of February, 1943?

A. For the radio station for the month of February?

1738 Q. 1943.

A. Yes, I do.

1739 Q. And what is that total?

A. Total is $30,999.66.

1740 Q. Well, now, by the station, I don't mean the new company. I mean that was received in February. I thought it was a total of two figures you gave me.

A. I will give the total of the figures for the station and the Society.

1741 Q. Well, that is what I mean.

A. That is $59,799.38.

1742 Mr. Wells: Wait a minute. Let me ask you, is that February?

The Witness: That is money received during the month of February.

1743 Mr. Wells: By whom?

[fol. 381] The Witness: By the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc.

1744 Mr. Wells: For what?

The Witness: For January's business.

1745 Q. But received in February?

A. Received in February.

1746 The Court: Is it for January, do you know, that is, for December's business?

The Witness: That is for December's business.

Cross-examination.

By Mr. Crossman:

1747 Q. Mr. Larson, the actual cash intake for January, a part of it was from January 1st to 14th, is that right? Is there a separate figure on that?

A. For money received during the month of January?

1748 Q. Yes.

A. There is no separate figure on that. All that money is for December, and it belongs to the Woodmen of the World Life Insurance Society.

1749 Q. So none of the receipts of $63,538.66, to which you testified, belongs to Radio Station WOW, Inc.?

A. No, sir.

1750 Q. That all belongs to the Society?

A. That all belongs to the Society.

1751 Q. Because earned in the previous month?

[fol. 382] A. That is right.

1752 Q. When you come to February, you gave a gross cash intake of $59,799.38, is that right?

A. That is right.

1753 Q. And is that, generally, the receipts from the earnings of the station in January of 1943?

A. Well, as far as I would know, I think so, without checking back.

1754 Q. But generally, you would think so?

A. Yes, sir.

1755 Q. Now, how much of the $59,799.38 was January earnings of the Society?

A. $28,799.72.

1756 Q. How much of the $59,799.38 was January earnings of Radio Station WOW, Inc.?

A. $30,999.66.

1757 Q. And the last two figures given make a total of $59,799.38?

A. That is right.

Cross-examination.

By Mr. Wells:

1758 Q. That is the gross receipts without any disbursements or expenditures for the operation of the station?

A. That is right.

Recross-examination.

By Mr. Massey:

[fol. 383] 1759 Q. Mr. Larson, then I understand that the figure $30,999.66 represents gross income to Radio Station WOW, Inc. for the business which they did in January after they took over on the 14th at 11:00 o'clock?

A. That is right.

1760 Q. In addition to that did they have any other receipts?

A. I have given all the receipts.

Redirect examination.

By Mr. Stewart:

1761 Q. Mr. Larson, as I understood, you kept the books of account with reference to the radio station too?

A. I did not, sir.

1762 Q. You do work in that department?

A. I acted as an auditor for the radio station at that time.

1763 Q. Well, now, to get this clear in my mind, there is a figure showing operation allocated to Station WOW for the year 1942, showing receipts $652,303.63. Now, would that be the cash received during the year from the operation of the station, or would that include cash received the previous year?

1764 Mr. Crossman: Wait a minute. It could not include the cash received the previous year; that is perfectly clear.

1765 Mr. Stewart: That is what we want.

1766 Mr. Massey: Let the witness answer.

1767 Mr. Crossman: Don't ask any tricky question about [fol. 384] that.

1768 Mr. Stewart: Nothing tricky about it. I want to know about it.

1769 Mr. Wells: We will stipulate that.

1770 Mr. Crossman: How can the cash received, the same cash received be in two years?

1771 Mr. Stewart: He says he stipulated that is right.

1772 Mr. Wells: That would not be for both years.

1773 Mr. Crossman: Let's listen to this question.

(Question read.)

A. It would not include cash received from the previous year.

1774 Q. Well, I didn't think so. I wanted to get that clear in my mind. So that for the year 1943, when a statement is made up of the receipts of the station from January 1, 1943 to December 31, 1943, it will show for the month of January receipts of sixty-three thousand some-odd amount, and for February receipts of fifty-nine thousand and some-odd amount?

A. No, not for the station, no.

1775 Q. I don't mean for the new company, but I mean there had been received from the station, whether received by the Society or the new company.

A. I would like to have that asked again.

1776 Q. I am not trying to confuse you.

Mr. Crossman: I want to object to that for the reason it is incompetent, it is speculative, it is hypothetical, it deals [fol. 385] with no state of facts, and is not a field of expert or opinion testimony. It is a pure speculative thing. Nobody could answer that question as to a statement prepared in the future is going to show with reference to these items.

1777 Mr. Stewart: Just whether it includes these items.

1778 Mr. Crossman: When the statement is not made and cannot be made until the end of the year under your own question.

1779 Mr. Stewart: Well, if he makes up a statement at the end of the year, would it include these two figures there of operation of the station.

1780 Mr. Crossman: How does he know? Objected to as incompetent, irrelevant, purely hypothetical.

1781 The Court: You don't know what that statement contains, was not made by you or under your directions?

1782 Mr. Crossman: No, it was not, Judge.

The Witness: No.

1783 Mr. Crossman: The figure that Mr. Stewart took off the paper was not made up by this man at all.

1784 The Court: Mr. Pakes is in the room here. Ask him.

1785 Mr. Crossman: Yes; the figure that he took off is not even off of the exhibit.

1786 The Court: Mr. Pakes is here.

1787 Mr. Massey: Yes, he is here. I suppose all the records have gone back, though.

[fol. 386] 1788 The Court: I am talking about this record here that Mr. Wells has.

1789 Mr. Wells: He was on the witness stand, and that was the thing he would not ask him about, and that is the thing I did ask him.

1790 Q. Mr. Larson, is this right, that the cash receipts for February of 1943 were a total of approximately $59,000, and for January a total of approximately $63,000?

A. That is right.

Witness excused.

[fol. 387] 1791 Mr. Stewart: The plaintiff offers in evidence the deposition of John B. Dawson, taken in this case and now ~~on file in this case,~~ consisting of the direct examination, as follows (Reading):

"John B. Dawson of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows:

Direct examination.

By Mr. Stewart:

1792 Q. Will you state your name, business address and occupation, please?

A. John B. Dawson, attorney at law, 48 Wall Street, New York City.

1793 Q. Are you a member of a law firm? If so, give the name of that firm.

A. I am a member of the firm of Thompson, Wood & Hoffman.

1794 Q. How long have you been associated with that firm?

A. Since March 1, 1926.

1795 Q. And how long as a partner?

A. November 1, 1933, I became a partner.

1796 Q. Mr. Dawson, are you in some way related to Mr. De E. Bradshaw, president of the Woodmen of the World Life Insurance Society?

A. Only by marriage.

1797 Q. As I understand it, your wife is Mr. Bradshaw's daughter?

A. That is correct.

[fol. 388] 1798 Q. Has your law firm represented parties interested in the Consumers Public Power District of Nebraska?"

Mr. Crossman: That is objected to as incompetent, irrelevant and immaterial, having no reference to any issue in this case. I would like to be heard on the objection to the entire line of inquiry.

The Court: You may answer.

"A. We have represented the banking syndicates that have purchased Consumers Public Power District's bonds in the matter of approving the bonds and rendering an opinion which passes with the bonds in the market.

1799 Q. In what transactions have you so represented the banking syndicate?

A. My recollection is that the Consumers have issued nine separate issues of bonds, and we have approved each of those issues.

1800 Q. Do you know approximately the total amount of those issues?

A. In the neighborhood of forty millions of dollars.

1801 Q. Is that same syndicate interested in securing the bonds if and when issued in connection with the purchase of the Nebraska Power Company facilities in Omaha by the Consumers Public Power District?"

Mr. Crossman: Object to that question as incompetent and immaterial, and I desire to make the objection stand to the entire line of inquiry.

The Court: Overruled.

[fol. 389] "A. I don't believe that the organization of the syndicate on the purchase of the proposed bonds, to purchase the Nebraska Power Company, has as yet been completed, but I have represented the syndicate managers of the previous issues who very likely will manage the syndicate in this issue.

1802 Q. And if they manage this syndicate, I assume you expect your representation to continue?

A. Yes.

1803 Q. Who is that syndicate manager?

A. There are three or four firms which are participating in the management: Stranahan Harris of Toledo; John Nuveen Company of Chicago; A. C. Allyn of Chicago—that my recollection is that have been in all those issues, but there is no guarantee that that same group will manage this account—the syndicate on the proposed issue. That may be changed when and if the bonds are issued.

1804 Q. Are you acquainted with Mr. Guy Myers who has been connected with the acquisition of the power facilities in Nebraska?"

Mr. Crossman: Objected to as incompetent and immaterial to any issue in this case, and ask that the objection stand to the entire line of inquiry.

The Court: You may answer.

"A. Yes, sir.

1805 Q. How long have you known Mr. Myers, approximately?

A. Approximately ten years.

1806 Q. What has been the nature of your acquaintance [fol. 390] with him, Mr. Dawson?

A. He has been a client of our office in some instances, and he has represented as fiscal agent various municipal authorities which have issued bonds, and I met him through his representation of the Seattle Light & Power Department.

1807 Q. Has he been what you call the fiscal agent of the Consumers Public Power District in Nebraska?

A. That is correct.

1808 Q. In each of these transactions that you have mentioned where they have acquired facilities in Nebraska?

A. That is correct.

1809 Q. Have you personally handled these transactions for your office in connection with the banking syndicate?

A. They have been in my charge in the office but a great deal—I won't say a great deal—strike that—a substantial amount of the actual work on the matters has been handled by others in the office.

1810 Q. But under your supervision?

A. Except where my partners have taken over on occasion.

1811 Q. Generally speaking though, it is your business?

A. That is correct—not my business, but it is——

1812 Q. I mean, your business to handle and look after in the office?

A. My—one of my duties.

Mr. Stewart: Yes.

The Witness: If I might just interpolate something here to give you a little idea of it—is that our firm special-
[fol. 391] izes in this municipal bond work and we do nothing else, so that all members of the firm are equally capable of handling this matter or any other similar municipal bond matter.

1813 Q. How many lawyers are there in your office?

A. Seven.

1814 Q. I believe you said you also represented Mr. Myers as attorney in some transactions?

A. On some occasions he has asked me to prepare contracts for him and advise him generally in respect to powers of municipalities to issue bonds in various parts of the country.

1815 Q. How long have you represented Mr. Guy Myers?"

Mr. Crossman: I wish the previous objection may be entered to this line of questions.

The Court: You may answer.

"A. To that extent, I have represented him off and on ever since I have known him."

1816 Q. Are you representing him in the proposed acquisition of the Nebraska Power Company facilities in Omaha by the Consumers Public Power District?

A. No; I worked for the banking syndicate there and for the District. I have done some work for the District also —some litigation that is now pending.

1817 Q. What in a general way is the basis of the compensation that your firm receives in representing the banking syndicate in connection with these transactions?

[fol. 392] A. You mean how do we arrive at the amount?

1818 Q. Yes,—is it based on time or the amount involved or——

A. (Interposing) Well, it is a combination of time and the amount involved.

1819 Q. Could you state approximately what compensation your firm has received up to the present time in connection with these transactions whereby the Consumers, in Nebraska, has acquired the various power facilities?"

Mr. Crossman: I wish the record to show that I renew the objection, which may be repeated.

The Court: You may answer.

"A. My guess would be something in excess of $80,000 over a period of approximately seven years. I think we started to work on this in 1936.

1820 Q. Approximately what compensation have you received from Mr. Guy Myers in connection with those transactions?

A. None.

1821 Q. Do you now have any agreement of any kind or understanding as to the compensation that you or your firm will receive in connection with the services that you may render in the purchase of the Nebraska facilities by the Consumers Public Power Company?

A. No, sir.

1822 Q. Or any agreement of any kind or understanding with Mr. Myers concerning any compensation that you or the firm will receive in connection with those transactions?

[fol. 393] A. No, sir.

1823 Q. Has your firm rendered any service to the Woodmen of the World Life Insurance Company?

A. Yes, sir.

1824 Q. In what capacity?

A. As attorneys representing them in litigation.

1825 Q. Do they now have any pending matters for the Woodmen of the World?

A. Yes, sir.

1826 Q. What in a general way are the nature of those pending matters?

A. We are representing them as parties plaintiff in a joint suit of the National Broadcasting Company, Stromberg-Carlson Telephone Manufacturing Company and Woodmen of the World Life Insurance Society against the United States and Federal Communications Commission, now pending in the Supreme Court of the United States.

1827 Q. Have you represented the Woodmen of the World in that litigation from its inception?

A. Yes, sir; and it was started in, I think, October, 1941.

1828 Q. Can you state, Mr. Dawson, approximately what your—you or your firm has received from the Woodmen of the World in connection with that litigation?

A. Nothing.

1829 Q. Mr. Dawson, are you to receive compensation for those services from the Woodmen of the World or from the N. B. C.?

A. From the Woodmen of the World.

[fol. 394] 1830 Q. What other matters do you now have pending for the Woodmen of the World?

A. I dont think we have anything.

Mr. Wells: I don't think so.

The Witness: Nothing.

1831 Q. Have you represented the Woodmen of the World in any way in connection with the leasing of its radio station?

A. No, sir.

Mr. Stewart: I believe that's all."

Mr. Crossman: (Reading).

"Cross examination.

By Mr. Wells:

1832 Q. Mr. Dawson, have you or your firm represented within recent years the City of Omaha in reference to any bonds that it has issued—bond issues?

A. Yes, we have.

1833 Q. In what amounts and when?

A. I am not prepared to answer that offhand, Judge. We have been bond counsel for the City of Omaha since long before I became associated with the firm. I have been doing the Omaha work in my office, but Omaha has not put out many bonds in the last several years. Their most recent issue was an airport issue of, I think, $500,000, which we approved.

1834 Q. Have you represented any other municipality or governmental entity in Nebraska?

[fol. 395] A. We approved a most recent issue of Lincoln, Nebraska bonds which consisted of three issues. My recollection is one was for widening or for opening Fifteenth Street and—just a second—Fifteenth Street and other improvements in connection with, I think it was the city auditorium.

1835 Q. Mr. Dawson, were you consulted with or had any connection, directly or indirectly, regarding the lease contract that is now in litigation between the Woodmen of the World Life Insurance Society and WOW, Incorporated?

A. No.

1836 Q. In your representation of the City of Omaha and Lincoln and the bankers syndicate to which you have referred, have you any interests, directly or indirectly, as an attorney individually or for your clients in this litigation or in this contract?

A. None whatsoever.

1837 Q. Had you ever seen the petition in this case until a few moments ago when you came into this room?

A. No, sir.

1838 Q. Had you ever seen the lease contract or knew of its terms or considerations expressed therein?

A. No, sir.

1839 Q. Have you as the son-in-law of Mr. Bradshaw, or you or any member of your family any interest in this lease or its outcome?

A. No, sir.

[fol. 396] 1840 Q. Have you any interest, directly or indirectly, with anybody connected with it in relation to this transaction?

A. No, sir.

Mr. Wells: That's all."

Mr. Stewart (Reading):

"Redirect examination.

By Mr. Stewart:

1841 Q. Mr. Dawson, do you recall the per cent of commission that Mr. Guy Myers has received as fiscal agent for the Consumers on these deals in Nebraska?

A. Why, my recollection is that it figures a little over one per cent on the whole transaction.

1842 Q. That is one per cent of the purchase price—a little over one per cent of the purchase price?

A. That doesn't mean one per cent of the bond issue, but one per cent of the company that they bought. I don't recall exactly. It is on a sliding scale, and the larger the amount the smaller his percentage gets.

1843 Q. Do you recall what the per cent starts at—the basis of the first per cent?

A. I believe two and a half, and as it gets larger it slides down to a smaller percentage.

1844 Q. Down about how far?

A. I think one per cent is the lowest.

1845 Q. You have seen those contracts in which those per [fol. 397] cents were fixed?

A. Yes."

Mr. Crossman (Reading):

"Recross examination.

By Mr. Wells:

1846 Q. Have you or your firm any interest in Mr. Myers' fees in the past or in the future?

A. No; we aren't paid by Mr. Myers at all. We receive our fees for approving these bonds from the banking syndicates in the Consumers deals.

1847 Mr. Wells: That is the way I understand you.

The Witness: On other matters we may be employed by the city or the district or whatever entity happens to be issuing the bonds, but in this particular—in the case of Consumers, they have no money with which to pay their attorneys—I mean they have no money with which to pay

bond attorneys, because their revenues are all tied up with the operations of each individual division, so that they could not use any of their existing revenues for acquiring a new property.

Mr. Wells: That's all."

Mr. Stewart (Reading):

"Re-direct examination.

By Mr. Stewart:

1848 Q. Well, normally who would pay your fees in trans-[fol. 398] actions of the character that you mentioned?

A. It is probably fifty—no, not quite that much—in our general municipal bond practice we are customarily paid either by the banking syndicate or by the municipality. In the majority of cases, we are employed by the municipality and even in some of those cases the bonds are sold on the basis that the banking syndicate will pay the cost of the approving opinion.

1849 Q. And that is the way that these Consumers' transactions are handled?

A. The Consumers' transactions, we are employed by and paid by the banking syndicate.

Mr. Stewart: That's all.

Mr. Wells: That's all.

Mr. Stewart: Thank you very much, Mr. Dawson.

1850 (To stenographer): Put in there that we waive signature.

1851 Mr. Wells: Oh, yes; just like the others.

Witness excused."

1852 Mr. Stewart: We rest.

1853 Mr. Crossman: On behalf of the Woodmen of the World Society and the individual officers and directors, I wish to state in the record at this time that it is our view, very definitely, that the evidence at this point does [fol. 399-410] not establish any cause whatsoever upon the affirmative charges of fraud that are in this petition. However, I am authorized to say on the part of these individual officers and directors that in this case where there are ugly charges of fraud, that regardless of the fact

as to whether the plaintiff's evidence states a case at this time, that all of them welcome this opportunity to be heard and to testify and to go into every detail with reference to this transaction, and that is what we propose to do.

I simply make this statement in order that your Honor might not feel that we have passed this point without having given some consideration to the fact of the insufficiency of the evidence. But regardless of that, and regardless of what your Honor's view may be about it, in a case of this type it is our feeling that the whole case should go in, and that these men that have been accused by these allegations in this petition should place in their testimony so that your Honor may have a complete record of this transaction in this case. So, so far as we are concerned, unless your Honor has a different view, we propose to proceed with the evidence in chief in our case.

1854 Mr. Massey: Let the record show that the defendants Radio Station WOW, Inc. and John Gillin join in the remarks of Mr. Crossman.

[fol. 411] De E. Bradshaw called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

1855 Q. Please state your name, residence and occupation.

A. My name is De E. Bradshaw; I live at 102 South 51st Avenue; and I am president of the Woodmen Of The World Life Insurance Society.

1856 Q. How long have you been president?

A. Ten years and three months.

1857 Q. How long have you been connected in any official capacity with the Woodmen Of The World, and in what capacity?

A. In 1899 I was elected by the head Camp, composed of the States of Arkansas, Louisiana and Mississippi, as head council. Immediately following that, that is, in February immediately following that I attended as a delegate from that head Camp, the Sovereign Camp session which met at Memphis, Tennessee, March the 13th—12th or 13th of 1899,

and I was there elected to what is known as Sovereign Sentry. I was thereby a member of the Board of Directors, and continued on as a member of the Board of Directors, either in that position or as Watchman or Escort, being re-elected from time to time until October, 1916 when I was made general attorney, and I came to Omaha and I resigned that office as a Director of the Woodmen Of The World and continued as general attorney up until the death of my [fol. 412] predecessor, Hon. W. A. Fraser, which occurred November the 6th, 1932, and on November the 30th, 1932 I was elected president, and I have been re-elected and have continued as president from that time until the present time.

1858 Q. Have you resided in Omaha since October, 1916?

A. I have.

1859 Q. Where did you reside previous to that time?

A. Little Rock, Arkansas.

1860 Q. What was your business?

A. I was a practicing lawyer.

1861 Q. At Little Rock?

A. Yes.

1862 Q. Where were you born and reared?

A. In Izard County, Arkansas, about one hundred and twenty miles north of Little Rock, in the foothills of the Ozark Mountains.

1863 Q. You were general attorney of the Woodmen Of The World Life Insurance Society in 1923, when the radio station WOW was first installed?

A. I was.

1864 Q. Who was president of the Society at that time?

A. Mr. William A. Fraser.

1865 Q. What were the gross assets of the Woodmen Of The World Life Insurance Society on December 31 in 1932, when you became president and its chief executive officer?

A. My recollection is, and I am sure it is correct, approximately correct, between 110 and 111 million dollars.

[fol. 413] 1866 Q. I believe it has been testified to that it is now approximately 136 million dollars.

A. As of December 31st it was 136 million plus.

1867 Q. During the ten years from December 31, 1932 to December 31, 1942, approximately what amount, if any, has been paid and distributed to the members of this Society in refunds from the earnings of the Society, and savings?

Mr. Stewart: That is objected to as immaterial, and not tending to prove or disprove any of the issues in this case.

The Court: I will receive it.

A. Over eight million dollars.

1868 Q. Mr. Bradshaw, when, to your recollection, was the question discussed among the members of the Board of Directors of your Society as to a disposition of Radio Station WOW?

A. It was a matter of general discussion back and forth between the members of the Board of Directors ever since I became president, first, because it had not earned any money, and been a loss.

1869 Q. When it was first installed until you became president in 1932 what were the net earnings to be distributed of that radio station?

A. It had not earned anything. It was in the red seriously.

1870 Q. For those ten years?

A. Yes.

1871 Q. About when did that radio station commence [fol. 414] to have any net earnings, if at all?

A. Well, it began definitely in 1934 to show an increase. We had—that answers your question. I would like to go on further, but then that answers your question.

1872 Q. At that time what reason was expressed or given by the Board of Directors and the different members thereof as a basis for a disposition of the radio station?

Mr. Stewart: That is objected to as not being the best evidence. The record of the proceedings of the Board of Directors is the best evidence, and not the testimony of the witness. And calling for hearsay also.

The Court: That is a history of the thing. I think he can testify to that, but official business would be shown by the minutes. I say official business is shown by the minutes, but he may tell what took place otherwise.

A. Of course, we don't keep a record of ordinary conversations. There were different reasons assigned. Of course, one was that we were losing money on it, and had been for some time along there, and then when we began to make a little money it was thought advisable—some said we should go on with it, and some said we should not. We had gotten to a place where I thought that we should expend a good

deal of money, and did when we went to this new building, and against the advice of some of my friends and members of the Board, spent $169,000 in rebuilding and putting in a [fol. 415] better station, and we put a good deal of drama in the thing; we painted the pictures, we made the most—we had the most beautiful rooms in America for our broadcasting rooms; we had forty thousand people in one week go through the station by the counter businesses. And so we got started to pay well, and it began to do pretty well. Mr. Gillin was handling it and working hard for the production of business, and it began to grow and we got to the place where we had gotten our money back, and some of our Board members had been opposed all the time to a continued ownership of the station. Then after Mr. Newberry came here, and he stayed here two or three years before he became secretary, working for us, he took a rather decided opposition to the ownership and expressed it on almost every occasion, and usually when we were sitting around there would be discussions; Colonel Patterson would say: "It seems to me we are in the insurance business anyhow, why are we fooling with the radio?" And I found the group—some of them favorable and some of them unfavorable. I might say that I had quite a bit of ambition about it, I had taken ahold of a dead pig, and one that was a loss, and I had tried to build it up so that it would make our money back, and more than that.

1873 Q. Well, did you personally initiate the proposition of disposing of it, or was it by some other member of the Board?

A. Well, if you would ask for formal—whether it was formally done, I would say that I formally initiated it by calling it to their attention, but I was rather driven or pushed [fol. 416] by that conclusion or attitude of some of the members of the Board.

1874 Q. Was it about 1936 or 1937 that some definite action was taken by the Board of Directors as shown by this record, by resolution, authorizing you to negotiate some disposition of it?

A. It was. We had had offers before for it.

1875 Q. Will you please state to the Court, without my interrupting you by questions, a brief history of the effort to dispose of this radio station from the beginning up until it was finally consummated?

Mr. Stewart: That is objected to as not being the best evidence. The record contains the reports made by Mr. Bradshaw of his activities in connection with the radio station and its disposition, containing all of the records. They have all been introduced and they are the best evidence.

The Court: As to the records, I think that is true, but I think anything further in connection with the history of it, he may relate it.

Mr. Wells: That is what I want.

A. In 1935, in the early part of that year, I cannot think of the gentleman's name who is one of the owners of the Des Moines paper——(interrupted)

1876 Q. Cowles?

A. Cowles came over there, and I was ill at that time, had been in an automobile wreck and was home, and he came out and offered me $200,000 for the station. He said he [fol. 417] would give me the check now. And I told him I would not be interested in selling it at that amount, that we had thought about it and had considered if we could get a good price for it, I would sell it, but I would not sell it for that. Nothing came of that afterwards. He didn't pursue it any further. Neither did I.

And later on I thought I had an offer from the World-Herald; the attorney for the World-Herald had some——(interrupted)

1877 Q. What is his name?

A. Mr. Martin, a very reliable gentleman, I believe a lawyer here in town, and he——(interrupted)

1878 Q. Which Martin is that?

Mr. Massey: Paul.

A. Paul, isn't it?

1879 Q. Paul Martin. All right, go on.

A. He contacted me over the telephone—that was later, probably a year later, maybe more, I don't remember, and he tried to—he wanted to make an engagement with me with Mr. Doorly, and I said, "What did he have in mind?" And he told me, and I said, "There wasn't any use in having him see me about it, because I wouldn't consider anything like that, no use wasting his time or mine." Well, the amount mentioned then, or rather indicated, was $300,000.

Then after that, in 1937, there was another indication that he would like to buy it, and that the World-Herald would

[fol. 418] but we did not ever come to any terms there. The fact is I suggested a price that was at least $500,000 more, and that was not satisfactory.

Then we had our meeting, and in our Board meetings, without being recorded on the books, the consensus of opinion was later on that we should get rid of the station; its volume, the amount of its business was a troublesome matter, because we have a very large business, and we have got a lot at stake, we have 136 million dollars worth of income from all our membership, liabilities at stake, and state and federal taxes, from which it is now exempt, and that gave us all concern, and very much so. And then skipping over the main points of the ordinary conversations, we had, oh, I think it was in 1942, we had a meeting at—we were having a Board meeting at Miami, Florida, I believe, and the matter was discussed there rather vigorously, and I advised the Board that I had been in conference with different people in an effort to sell the station, get an offer for it, and Johnny Gillin and I had talked, it was in 1941—Johnny had made the station a success. People in the east who are in the radio business talk of the station as Johnny's station, they don't say my station or the Woodmen of the World station, it is Johnny Gillin's station. He has a flare for that business, and very successful, and I talked to him about it, and I wanted to take care of Johnny because he stayed with me, and he made the station and got it to a place where it was very worthwhile, and I asked him to contact [fol. 419] the National Broadcasting Company—that is the company which makes contracts with the various advertisers, and they put that advertisement over a certain group of stations. The National Broadcasting Company has the Red Network, and that takes in a lot of stations. We belong to the Red Network, or did, and then there is the Blue Network, and then there is another system of chain stations, CBS. And I said, "You know Mr. Niles Trammell very well, the president of that organization, he has always been a good friend of ours, and worked together, and worked with the National Broadcasting Company; we have even engaged in litigation that was as much to their benefit as ours, and probably more so, and prosecuted cases to final determination because of our friendship for the National Broadcasting Company, which has been a profitable friendship too, but we have been very loyal with them," and I

asked Johnny to contact them and to see what we could do, especially Mr. Trammell. Then I suggested to him also that we find out if we could see what the Federal Communications Commission would do. We had—I had heard that they would not grant a transfer of licenses where an excessive price—far in excess of purchase price was made, claiming that the license was a matter that belonged to the United States Government, was transferable only at the option of the FCC, and that they reserved the right to regulate it, control it, or take it away from anyone of us, or terminate it, and that they would not let that enter into the [fol. 420] consideration, the value of that franchise enter into consideration in the exchange in the purchase of the station, that it could not be computed as a fixed value, and I understood that they had refused to let some stations be sold because of the excessive amount which was offered for them. Now, I don't know that that is so. I was told that. So I asked Johnny to inquire about that, get information about it, and to get the National Broadcasting officials to find out in Washington what we could do about it, and I got a report to the effect that we could not get any approval of a sale for more than $600,000, probably as much as $650,000. Well, I thought the station was worth more than that. Why, if that was the limitation, there was no use in our trying to sell the station, of course, if we could not get the license transferred. So obviously it was important to find out in advance what was the most we could get, but it seemed to me to be ridiculous that we should sell the station for that much, or that they would not approve more, and I figured that we could get a larger—get an approval for a larger price, and I thought $850,000. Anyhow, I wanted to try it that way. If I couldn't do it, we would not be worse off. But at that meeting of the Board of Directors there in Florida—it does not appear of record—it was moved by one of the members of the Board that I be authorized to dispose of the station for anywhere between $600,000 and $650,000. I asked the Board to please not pass the resolution, and asked that it be withdrawn for [fol. 421] the reason that I did not want that record made there, because I had hoped I could get a lot more for the station, and with us—and with the large number of people that we have looking at our records and examining them, of course it is to be expected that if one is very deeply interested in the purchase he might find out what the Board

had placed in the records, and they very kindly consented, and the motion was withdrawn, and so nothing was said about it. I said, "I think I can get more."

And then previous to that I should say that we, Gillin and I, had taken up further with the National Broadcasting Company and they had agreed. And then he agreed to take us over to the special business company, whatever it was that bought it, would make them a loan for $350,000. Mr. Trammell was in Florida. I was to see him in New York, but he had been ill and he went to Florida. And so I went to see him there, and discussed the matter with him, and he said, "$350,000 was a good big loan in these rather hectic times. What do you say it would be worth, and what security do we have?" I said, "You will come after us. We are going to get ours, or our first lien on the station for the balance of the purchase price, and then you come in." Well, he said he could not go that far, they would not go to $300,000; wanted to know if I could get along with $250,000. I said it depended—it would depend on the crowd we could get together, and that was because we talked nothing but selling the station then, and I was sticking for $850,000. And he said, "What makes you think [fol. 422] you can get the station sold for—that you can sell it for $850,000?" Well, I said, "I think I can." And he said also, "I doubt it, because my information is that you cannot get a sale for more than $650,000 approved." Well, I said, "We are a fraternal society and they won't pay no attention to us, and maybe if we make it attractive up there and they can go on another form we might be able to get it through. Well, we separated after that, and agreed on another conference, and he went back to New York and I communicated with him, I think I wrote to him, maybe I telephoned him, but, anyhow, we did talk over the telephone, and he said, "I have been having this looked up and I find the taxing problem under the new bill is such an issue that I don't think we can loan anything." It was a surprise to me. I said, "What tax problem?" He said, "Under this new bill that is in Congress, our experts had figured that the most that you can earn on that is between $32,000 and $64,000 a year; that is the net you can earn." Well, I said, "We told you that we earned nearly $250,000 last year." Well, he said, "Taking that as the net earnings from taxes from the Federal Government, then you can only make $32,000 a year." Well, I was very much

surprised at that, because Johnny and I had gotten some local people here rather interested in the matter and we were making declarations about how good a thing it was. I didn't want to sell it without Johnny was in, going to manage it, and I wanted to sell something that was worthwhile and was reliable and worth what it was sold for, [fol. 423] so I got our tax specialist, Mr. V. J. Pakes, over there to figure it and he said they were correct about it. And we figured it different ways and we could not figure out that anybody could have for a lifetime guaranteed earnings or any man guaranteeing himself what he could get, would be from $50,000 to $52,000 that they would make net from federal incomes taxes, $250,000. Well, I was disappointed at that, and we, at that time, were discussing the matter with a Carl Swanson and his two boys. I had asked Johnny to go and see them because they are very important in the city and liked to make money, and have money, and he had talked to them about it, and they had shown a great deal of interest in getting in and buying the station and paying a good fair price for it, but when they got this tax problem they got worried about it, so they got a tax specialist. I hired another man, I hired Mr. Loucks—whatever the firm name is—Gilchrist, isn't it? I asked him to make a report on it. I wanted to be certain about this tax business, and he came back and made a report—(interrupted)

1880 Mr. Stewart: Now, I want to interpose an objection to any further hearsay testimony, and being incompetent, Mr. Bradshaw has detailed what people all over the country told him about stations. Now, we are getting down to the point where the witness is right here in the city of Omaha, and people are being quoted. It seems to me that [fol. 424] is hearsay and should not be received.

1881 Q. May I ask you if you were advised that the net that could be received on the station from the station earnings was about $28,000?

Mr. Stewart: That is objected to as calling for hearsay evidence, and leading, and not showing the source of the information.

The Court: That may be the situation, but I think he can relate the experience. He is charged with fraud, and I think he can answer those questions.

1882 Q. All right, go ahead, Mr. Bradshaw.

A. We saw Mr. Loucks, and Mr. Loucks made a report, and he is a tax specialist of the city, of less returns than that which Mr. Pakes had given. So that after considering and in trying to meet that situation, it looked like we could not get by, and I was determined to study out some other way by which the station could be disposed of and we could get as much money out of it, and it occurred to me that I could lease the station, that I would for a period of years, at so much a month, the monthly lease payments would not be taxed, and therefore a group of gentlemen could take this station and operate it and pay this rent less an amount which they had to pay of the increase, would produce the amount they had to pay, would not be taxable. I consulted Mr. Pakes and he thought that was all right. And then I tried to evolve that sort of a plan, because our sale proposition had disappeared. Mr. Carl [fol. 425] Swanson would not go on with it. He said, "I cannot tell where I am coming out. I have to put a lot of money in here, several hundred thousand dollars; I don't know where I will come out. Maybe lose the whole thing. The radio is uncertain anyway." And it was then that I tried to perfect this plan. During all of this time Johnny Gillin was by me asked to see if he could get anybody in the radio world anywhere that would buy the station or lease it. I don't know radio people, managers of radio stations, and could not go down here to some place, or some bank, or get anybody interested in it, because I don't know anything about the radio business, and he was all the time trying to reach some people, and then when I advanced this lease idea, that was a matter of development, so I wanted him to contact the people here and abroad with an effort to put the lease over, and wanted him protected in it, because Johnny had been very faithful to us and I wanted him to have a share in the business, if he could get it, and I was willing to do the best I could to help him get it from the other fellows who were leasing it. We tried Mr. C. A. Swanson, and he said, "I am out of it", he said, "I am through." And the boys were out for a while, got them interested in the lease again; one of them went out, said he would not go on, but the other one was rather inclined—I believe his name is Clark Swanson—and he stayed a while. Well, I talked to this man and I even talked to Mr. Dale Clarke and talked to some others,

to anyone who would talk, would be interested in it, and [fol. 426] I could not dig up any. Finally I prepared a suggested form of lease, by which we could show the terms, to see if we could work out something, probably a page of a lease, a memorandum of what we could probably do, and at different times the other things could be added, with a view of having something in which persons interested might begin an investigation. Well, we didn't seem to make very much progress. Mr. Gillin reported to me on different fellows that he had tried, and they would think about it a little while and pass out and would not go on with it.

And Mr. Guy Myers came into the picture. I saw him and tried to get him interested, and he said he would be interested, and I told him that I would insist on getting $250,000 put up for the lease. I could not get anybody to go for that. Then Johnny Gillin said, "You have been trying it for five or six months and you have not been able to do anything, let us ask him if he will go in without putting up so much money", and I went and asked him for very much less. Well, I finally said that I would try to operate it if they would put up $75,000, we would get a group together and put up $75,000 and we would let them have $25,000 out of the accounts. You see, this was going on month after month, and it might go with the lease the same as everything, contracts and chairs and typewriters and lease and the whole business, in order that they might have a working capital of $100,000; and then we talked to the FCC, that is the Federal Communications Commission, for a [fol. 427] transfer. Now, that commission had refused several licenses and had demanded the cancellation of others that had been granted a transfer of a lease or leasehold interest, I think, for more than two years, and had refused to make any more leases. Well, we were hoping to get by with a lease if we made it favorable, and Mr. Gillin was popular with the Federal Communications Commission, some of them call him Johnny, and I thought maybe we could get by with it; we would try it anyhow, we would not be any worse off. Well, Guy said that he would be willing, he had some friends in Washington and he thought that maybe the transfer could be obtained on the lease without a sale, no use for us to have any negotiations if we could not get the license transferred. So Myers said he would help us out and he was willing to take whatever was neces-

sary in order to get the movement started, to get the lease, and then get enough people together.

Now, along about that time I prepared a form of lease and it was introduced in evidence today, and that was probably the third or fourth, or maybe the seventh or eighth one that I had written up, and different leases abandoned. Then the question was of getting more men in. Finally John had gotten together a group which he thought would go in. They fell down on him and he went back and tried another group, and then they had this absolutely fixed for the 3rd of October, all the incorporation papers had been drawn and the lease was ready to be signed, and everything had been prepared up to that date. [fol. 428] It was going to be—well, I don't know—some of the ones that are in there now, possibly Mr. Erickson, a man of great property here, and a business man, he is a good merchant of much importance, and Clarke Swanson, they were going in and take $25,000 between them. That morning, when we met—they met over in my office to see if they could get together and go ahead with the incorporation of WOW, Inc. And these gentlemen told Mr. Gillin that they were not coming, that they were faded out of the picture, they didn't want any of it. And Johnny had been working for three or four months or more, and it wouldn't go through. In the meantime, I had talked to Jake Isaacson, as I did to Mr. Milliken, and as I had talked to Mr. Myers, and told them that I thought it would be a good thing; I said "Jake, you have been trying to buy some country newspaper for five or six years", and he said he would like very much to get in, but Jake was not on this. So Jake says, "What will I do with this man, he wants to go in with me?" And I said, "All right." I didn't inquire who it was, and so he was Samardick, and he come in and joined the group with us there, Mr.—— (interrupted)

1883 Q. Samardick?

A. Samardick, yes. And then the thing was, "could we get any of these men who were in there to take any more of the stock of the corporation than they had arranged, because they had to raise $75,000 in cash that day if they were going to form a corporation. Well, Mr. Matthews [fol. 429] said that he would increase his $5,000. These two gentlemen took ten. That was fifteen. And then

John Gillin, who had not taken any of it, or agreed to take any of it, was forced in to take the other ten, which he did, and that was enough, and then they executed the articles of incorporation there that morning, sent them to Lincoln to be filed, and after that was done, why, they entered into this lease contract.

Now, that was in strict pursuance of the directions of the Board of Directors, not only individually as they expressed themselves to me about it to be satisfied with it, and after the strict resolution which had been passed in August before, and the resolution about the sale of the property, and I explained that we had fallen down on that, and I had worked hard up to that time and I saw it was the only way out, and we had a Board meeting in August and I reported all these matters, probably telling it substantially as I have here, told the Board outside of the formal presentation of the matter, and I said I wanted to appoint a special committee here to look into the matter and make recommendations, "I may be too enthusiastic about selling it, I am definitely trying to get rid of the property as I think you want me to do, and I am doing my very best about it, and these are the facts." I said, "I have got a lot of stuff in my desk, and I want to appoint this committee and I want them to come and get all that stuff and look it all over and investigate the matter. I think that it would be proper to appoint the four lawyers [fol. 430] on our Board; Mr. Robert G. Plunkett, former city attorney, and a very prominent man in Macon, Georgia was one of them; Mr. Hines, State Senator from North Carolina, and a very important citizen and lawyer; there was another lawyer appointed on the committee, and Judge W. C. Braden that I brought out here some six or seven or eight years ago, member of the Board, I appointed him on the committee, and another one, as able as any lawyer in this room, was William E. Mooney in Chicago, and these gentlemen were the ones who went out and investigated the matter and came back with that report that you have read here.

1884 Q. Very Well, Mr. Bradshaw; don't relate what is in the record.

A. Yes. I am not telling you anything about the report.

(At 5:07 o'clock P. M., March 3, 1943 adjournment taken until 9:30 o'clock A. M., March 4, 1943.)

[fol. 431] 9:30 A. M. March 4, 1943.

Court convened pursuant to adjournment, same parties present as before, and the following proceedings were had:

DE E. BRADSHAW recalled for further direct-examination testified as follows:

By Mr. Wells:

1885 Q. Mr. Bradshaw, in your testimony yesterday afternoon you made a summary statement of the efforts made by the Board in the consummation of the lease in controversy: may I ask you this morning to state what factors directed the Board in the effort to dispose of this radio?

Mr. Stewart: That is objected to for the reason that it is not the best evidence; the minutes of the Board of Directors meeting is the official and the best evidence of what transpired at the meetings at which the lease or sale was considered.

1886 Mr. Wells: Now, Mr. Stewart introduced every report yesterday that was made by this gentleman as president of the Society, as to the resolution and just what I asked: now, I am asking the detail of those efforts, necessarily not recorded in the minutes.

The Court: I think he can testify. You don't contend that the statements in the minutes are exclusive evidence in the case.

Mr. Stewart: Yes, if the reasons are given why the Board takes certain action, that is the reason that must stand.

[fol. 432] The Court: Not the only reason.

A. I believe that each individual member had his own idea and his own reason, and they may have been anonymous in some respects but, for instance, my reason was principally the fact that we were injuring our entire insurance business.

1887 Q. In what way?

A. Well, the Federal income tax is not applicable to fraternal beneficial societies increase in assets or so-called earnings, and I was fearful that the ownership of the radio station would invite legislation which would tax all fraternal societies, and tax that portion of their business, which if it did, and all that would have to be done would be just to

leave a line out in the present income tax bill, and we would all be taxed.

1888 Q. You mean premiums so-called?

A. No, no, not premiums—tax upon our earnings. Last year we earned $2,900,000, that is to say, we had that much more than requirements, that much increase in assets, which would be subject to a federal income tax if the present law in that respect would be repealed. Now, that would be a tax very much greater, of course, than anything we could earn on the radio station. I know how difficult that is to handle in congress because I was one of the factors that helped get that law passed originally by congress, and I just didn't want to run that risk; it seemed to me it was too vital. That was one thing. Now, another thing which [fol. 433] all of the officers agreed about was the danger we had from unfavorable legislation in the different states. In the first place, there is some jealousy among fraternal societies, and they would like to stop someone from doing something. We had one bill in the legislature of this state to compel us to divorce ourselves from the radio business.

1889 Q. Let me ask you when that bill was introduced—do you remember?

A. Four years ago.

1890 Q. What was the number of it, do you remember?

A. Well, I think I have a copy of it in my pocket—I don't remember—380.

1891 Q. 380?

A. 380, Sam Klaver of Douglas introduced the bill.

1892 Mr. Wells: I desire to offer in evidence Legislative Bill number 380 introduced in the 53rd Session of the Legislature of Nebraska.

1893 The Court: What exhibit is it?

1894 Mr. Wells: Exhibit 27.

The Court: It is received.

Exhibit 27 received in evidence, same being made part of this record and being attached hereto as follows:

[fol. 434] EXHIBIT "27"

LEGISLATURE OF NEBRASKA

Fifty-Third Session

LEGISLATIVE BILL No. 380

A Bill

FOR AN ACT relating to insurance; to limit legal investments of companies engaging therein; to prohibit such companies from owning, controlling or having any investments in any radio station or stations to provide penalties for the violation thereof; and to declare an emergency.

Introduced by Sam Klaver of Douglas.

Read first time January 30, 1939, second time February 1, 1939. Referred to committee on Banking & Commerce Sent to printer February 2, 1939.

Be It Enacted By The People of The State of Nebraska:

Section 1. (a) No life insurance company, doing business within the state of Nebraska, or foreign corporations licensed to write life insurance within the said state, shall invest or allow to be invested any of their funds in any business except that which is directly connected with and in furtherance of the business of writing life insurance as designated by their charter. (b) No such insurance companies shall own or control or have any investments in any radio stations either in the state of Nebraska, or elsewhere, which are engaged or shall be engaged in the commercial sale of radio time and no such insurance company shall either own, operate or manage any such radio station except as it deals directly with and in the development of their own

insurance development.

Sec. 2. Any such business so operated shall be disposed of within one year from the date of the passage of this Act, and thereafter, any person, corporation, or association that violates any of the provisions of this Act or who violates any order of the Director of Insurance, not inconsistent therewith, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not to exceed $1,000 and imprisonment in the county jail not to exceed six months. The

[fol. 434a]

Director of Insurance is hereby empowered upon a proper and valid showing to lengthen the time in which that company doing life insurance business in violation of this Act may dispose of any interest in any business contrary to the provisions herein for a period not exceeding twelve months.

Sec. 3. Whereas, an emergency exists, this Act shall be in full force and take effect, from and after its passage and approval, according to law.

[fol. 435] 1895 Q. Now, proceed, Mr. Bradshaw with your reasons for undertaking to dispose of this radio?

A. We must publish all the transactions of the Society by filing with the Insurance Commissioner of this State and every other state in the United States, a full and complete report of receipts and disbursements, and, of course, we filed that report truthfully showing how much the radio station earned, and that naturally attracted the attention of those who were critical—I mean of other organizations—and it would cause some, maybe I should not say but I will say, designing persons maybe having other motives to start trouble against us by the enacting of legislation. Now, for example, we had an instance of that kind in this State last year.

1896 Q. State what it was.

A. There was a paper at Clay Center, Nebraska published articles about the Woodmen of the World and saying how much they earned on the radio, and going on, of course, having gotten the information, I presume, from the Insurance Commissioners office, and also building up all the animosity they could by publishing the amount of salaries that were being paid, and as the result an organization was gotten together for the purpose of initiating a bill for the management and control of the life insurance business and fraternal societies in this state, and it went so far as to get sufficient force to enable it to have the bills proposed to be passed or initiated, to have them published and prepared for circulation and so forth, and without any [fol. 436] opportunity of argument or showing, which would tax not only the premium income which is taxed on insurance companies but also to have a tax levied against all of the reserves of a life insurance company, which is not done in any state in the union. Of course, they couldn't exist.

1897 Q. Have you a copy of that bill that was prepared, initiated?

A. Well, I think it is a copy of it. I have never compared it, but I think it is. (Witness produces copy.)

1898 Mr. Wells: I desire to offer in evidence Exhibit 28 as part of Mr. Bradshaw's testimony.

1899 The Court: That is the bill he testified to?

1900 Mr. Wells: This is the bill he just identified entitled "Proposed Tax Measure".

The Court: It will be received.

Exhibit 28 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 437] EXHIBIT "28"

Proposed Tax Measure

Title

An Act relating to taxation; to amend Sections 77-101, 77-111, 77-204, 77-707 Compiled Statutes of Nebraska 1929, Sections 77-906, 77-104, 77-201 Compiled Statutes of Nebraska Supplement 1941; to define intangible property subject to taxation; to provide for the determination of the value of intangible property; to establish rules for deter-

mination of the situs of intangible property for taxation; to provide for election and compensation of county assessors; to provide for scheduling and assessment of intangible property for taxation; to require the recording of the best evidence of intangible property, excluding money and book accounts with the county clerks of the respective counties; to provide penalties for failure of recording; to provide the powers and authority of the county assessor, deputy assessor, precinct assessor and board of appeals; to compel full and complete disclosure of property subject to payment of taxes and for the ascertainment of the amount and value thereof; to provide for taxation of omitted property; to provide penalties for failure to comply with provisions of this act and for omission to list property for taxation; to provide for publication of the personal tax list and for publication of the list of delinquent tax payers; to provide for the appraisal and evaluation of real estate as a basis for the assessment thereof for taxation; to establish county boards of appeal to determine disputes as to property valuation; to repeal inconsistent sections and existing sections as by this act changed or amended; to repeal said original Section 77-101, 77-111, 77-204, 77-707 Compiled Statutes of Nebraska 1929, Sections 77-104, 77-201, 77-703 Compiled Statutes of Nebraska Supplement 1941 and to repeal Sections 32-211 Compiled Statutes of Nebraska Supplement 1941, 33-129 Compiled Statutes of Nebraska Supplement 1941 and Section 44-1261 Compiled Statutes of Nebraska Supplement 1941 and Sections 77-705, 77-709, 77-1701, 77-1911, 77-1912, 77-1913 Compiled Statutes of Nebraska 1929 and Sections 77-904, 77-905, 77-906, 77-1601 Compiled Statutes of Nebraska Supplement 1941.

Be It Enacted By the People of the State of Nebraska:

Section 1. That Section 77-101 Compiled Statutes of Nebraska 1929 be amended to read as follows: The word "property" includes every kind of property, tangible or intangible, including money, subject to ownership.

Sec. 2. That Section 77-104 Compiled Statutes of Nebraska 1929 be amended to read as follows: The term "tangible property" includes all personal property possessing a physical existence but excluding money. The term "intangible property" includes all other personal property including money, and among other things shall be taken

to mean notes, shares of stock, debentures, securities, bonds, judgments, royalties and license fees due or owing, evidences of indebtedness, choses in action, chattel mortgages, bills of sale, credits, money at interest, conditional sales contracts, contracts for payment of money or services, liens of any kind, other than real estate mortgages. For purposes of this act, however, the term "intangible property" shall not be deemed to include life, health or accident policies of insurance, judgments for support or alimony or for compensation under the Workmens' Compensation Law or notes secured by real estate in this state or obligations of the state or governmental subdivisions of the state expressly exempt from state taxation under the laws of the United States.

Sec. 3. That Section 77-111 Compiled Statutes of Nebraska 1929 be amended to read as follows: The word "Person" includes any number of persons; and any copartnership, association, joint stock company, corporation, or any other entity that may be the owner of property. For purposes of this act the word "person" shall also include executors, administrators, trustees, receivers, agents and fiduciaries exercising control or management over property.

Sec. 4. That Section 77-201 Compiled Statutes of Nebraska Supplement 1941 be amended to read as follows: All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. "Actual value", as used in this act, shall mean its value in the market in the ordinary course of trade. The face value of intangibles shall be deemed prima facie to be its actual value unless otherwise established.

Sec. 5. That Section 77-204 Compiled Statutes of Nebraska 1929 be amended to read as follows: Taxes assessed upon personal property and intangible property shall be a first lien upon the property of the person to whom assessed from and after the first day of November of the year in which they are assessed, until paid.

Sec. 6. At the general election in the year 1946 and every four years thereafter there shall be elected a county assessor in each county of the state, whose term of office shall be four years, and shall commence on the first Thursday after the first Tuesday in January following the election.

Sec. 7. The county assessors shall receive as compensation for their services the following sums per annum. In counties having a population of less than 4000, $600.00; in counties having a population of from 4000 to 8000, $1200.00; in counties having a population from 8000 to 12000, $1500.00; in counties having a population from 12000 to 18000, $1800.00; in counties having a population from 18000 to 30000, $2000.00; in counties having a population from 30000 to 75000, $2400.00; in counties having a population from 75000 to 200000, $3600.00; in counties having a population of over 200000 the county assessor shall receive $4200.00 per annum and he shall have two chief deputies; a chief field deputy whose salary shall be $3000.00 per annum and a chief office deputy whose salary shall be $2500.00 per annum and such other clerks and assistants to be appointed by him as the county board may find necessary whose compensation shall be fixed by the county board; the salaries herein provided for to be paid to the county assessors, deputy county assessors and such other clerks and assistants shall be paid in monthly installments from the general fund of the county. The compensation of the county deputy assessor and the precinct assessor shall be $5 per day for the time actually and necessarily involved in the discharge of their duties; 8 hours shall constitute a day's work. Vouchers for the amount claimed by the county deputy assessor and the precinct assessors as such compensation shall be approved by the county assessor before the claims are allowed by the county board.

Sec. 8. All intangible property as by this act described and having a taxable situs in this state shall be separately classified, listed and taxed.

Sec. 9. Intangible property shall be deemed to have a taxable situs in this state where owned (1) by an individual resident, corporation, partnership, association, business organization, common law or business trust organized under the laws of the state of Nebraska or held by or subject to the control of any executor, administrator, guardian, referee, receiver, agent, trustee, or other fiduciary residing in or exercising control or management over such property from within the state unless such property has acquired a business and taxable situs in some other state; (2) by a non-resident individual, partnership, corporation, association or business organization, trustee, executor, admin-

istrator, guardian, agent or other fiduciary where the property has acquired a business situs in Nebraska. Credits and choses in action are further deemed to have a taxable situs in this state when arising out of sales made herein or in contemplation of the performance of contracts made or to be performed in Nebraska or arising out of the delivery of property in Nebraska where the owner and holder of such credit or chose in action maintains an agency, place of business or has a collecting agent in this state.

Sec. 10. There shall be recorded by the owner, holder or person exercising control or management of all intangible property subject to taxation in this state, excluding money and book accounts, the best evidence of such intangible property, with the county clerk of the county in which such property is found, or where the owner or holder resides. The place of the recording of the intangible property shall thereafter fix its situs for taxation. All such intangible property, excluding money and book accounts, subject to taxation in the state of Nebraska, shall be recorded as herein provided within thirty days from and after the effective date of this act. Intangible property, excluding money and book accounts, thereafter coming into existence, shall be recorded within twenty days. Upon such offering for recording it shall be the duty of the county clerk upon payment of 10 cents per instrument to place a recording stamp upon the instrument so offered and to list each instrument, document or evidence in a proper book for that purpose. The record so made shall show the nature of the instrument, the name of the maker, the name of the owner or holder and the amount thereof. Banking corporations doing a general banking business in the state of Nebraska pursuant to law may in lieu of the separate recording of notes taken or held by such banks file a statement certified by an officer thereof listing all the notes taken and held by said bank within twenty days previous to the recording of said statement, and said statement shall be specific as to the name of the maker, the principal amount of the note, the date and place of payment thereof. The recording of such certified statement shall be deemed as effective as the separate recording of each note to which reference is made in said statement. No intangible shall be valid or enforceable nor may it be sold, assigned, trans-

ferred, or removed unless it has been recorded as herein provided and unless the tax due thereon has been paid.

Sec. 11. The county assessor, deputy assessor, precinct assessor or board of appeals shall have the right to require of every person, firm, partnership, corporation, fiduciary or representative owning or having control or management of property to reveal, disclose and submit for examination all records, books, memoranda and papers within the control of such person which in anywise may bear upon [fol. 437a] the existence, ownership, amount or value of property and to make an examination of such persons under oath. The county assessor, deputy assessor, precinct assessor and the board of appeals may require as incident to the scheduling, assessment or equalization of property among other things that any person, firm, corporation, partnership, fiduciary or representative shall prepare and submit an inventory of stocks on hand as may be required of them.

Sec. 12. That Section 77-707 Compiled Statutes of Nebraska 1929 be amended to read as follows: Any person failing, neglecting or refusing to comply with provisions of this act, or who shall upon demand of authorized officials fail, neglect or refuse to make such disclosure or submit to such examination as required by the next preceding section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than $10.00 and not more than $2,000.00 and shall be committed to the county jail until such fine and costs are paid or secured to be paid.

Sec. 13. Whenever the county assessor shall believe or have reason to believe that any real, personal or intangible property has from any cause been omitted in the assessment schedules of any person, firm, corporation, partnership, fiduciary or representative making a return for taxation in this state in whole or in part, in the assessment of any year or number of years, he shall proceed to correct the assessment rolls and add such omitted property with its valuation among the tax schedules of such person subject to taxation and shall proceed to effect a collection of the unpaid tax upon such omitted property. The right to assess property subject to taxation in this state but which was for any reason omitted from assessment shall never be lost or barred by passage of time.

Sec. 14. Any person, firm, corporation, partnership, fiduciary, or representative who shall evade, deceive or by any means or reason omit or fail to return for taxation all the property real, personal or intangible of every description which he is required to list shall in addition to all other penalties be subject to the penalty of having added to his assessment previously listed twice the amount of the valuation of the property not listed and such penalty shall become a part of the tax lien.

Sec. 15. In the first full week of November of each year, there shall be published once in each county in a legal newspaper to be designated by the county board thereof, the tax list of each resident of said county who has personal property scheduled for taxation. Such publication shall contain the name of the individual tax payer having property assesssed within each county, the precinct of the tax payer's residence, the assessed valuation of the personal property upon which said tax is being assessed and the amount of the taxes determined to be due upon the property assessed. Where the county contains several legal newspapers the publication of the personal tax list shall be divided so far as is practicable, so that the several newspapers shall contain the list of tax payers resident within the communities served by such newspaper.

Sec. 16. The name of each tax payer assessed for personal property tax including the tax upon intangibles, within each county of the state and who has unpaid taxes upon personal property or intangible property for the next preceding year or years shall be published once during the first full week in July of each year, in the manner as provided in the foregoing section. Such publication shall separately designate the unpaid tax for each preceding year.

Sec. 17. Except as hereinafter provided, all insurance companies transacting business in Nebraska, whether or not organized under the laws of the state of Nebraska, holding or owning property, whether real, personal or intangible, located in or having a business situs in Nebraska and which is subject to taxation by the State of Nebraska, or the governmental or political subdivisions thereof, shall file schedules listing such property and shall pay taxes on such property at the regular rate and in the same manner, and subject to the same penalties as all other tax-

payers. Every life insurance and accident insurance, or life and accident insurance company organized under the laws of any other state or country, and transacting business in Nebraska, including every fraternal beneficiary association organized under the laws of any other state or country operating on a basis of accumulating and maintaining reserves similar to legal reserve life insurance company reserves, in lieu of all other taxes upon intangible property, shall, at the time of making the annual statements as required by law, pay into the state treasury two per cent of the gross amount of premiums received by it during the preceding calendar year for business done in this state, including all insurance upon the lives of persons residing in the state, whether such insurance was written during such preceding year or prior thereto. At the time of paying the taxes such companies shall take duplicate receipts therefor, one of which shall be filed with the Department of Insurance. No certificate shall be issued by the Department of Insurance to or on behalf of any such company authorizing it to do or continue business in this state while any such percentage of tax remains due and unpaid. Every insurance company or surety company, organized under the laws of this state, and every fraternal beneficiary association operating on a basis of accumulating and maintaining reserves similar to legal reserve life insurance company reserves, organized under the laws of this state, in lieu of all other taxes upon intangible property, shall pay six mills upon the gross premiums collected in this state during the calendar year preceding the assessment, less reinsurance paid on Nebraska business and dividends paid policy holders in Nebraska during the same period, as shown by the reports of such company to the Department of Insurance. Said tax shall be paid to the State Treasurer on or before December 1st of each year: Provided, that all taxes paid by surety companies arising out of workmen's compensation insurance premiums shall be set aside by the State Treasurer and kept in a special fund to be known as the "Compensation Court Fund," which fund shall be used exclusively for the benefit of the Compensation Court. Wilful failure to file proper schedules or to make payment of taxes as properly assessed against such company or companies shall constitute cause for revocation of the license of such company to do business in the State of Nebraska. This section shall in no-wise or manner im-

pair or affect the imposition by the State of Nebraska of an excise tax to be paid by foreign insurance companies for the privilege of doing business in Nebraska.

Sec. 18. All real estate in this state subject to taxation shall be assessed on April first of each current year and reappraised and evaluated every two years beginning February 1, 1943, which appraisal and evaluation shall be used as the basis for valuation for taxation under the next regular assessment.

Sec. 19. Such biennial appraisals and evaluations as provided for by the next preceding section shall be made by the assessor and two resident licensed real estate dealers in each county who shall be appointed by the county board. Such persons employed to assist the county assessor as herein provided shall be paid upon a per diem basis for their services. The amount thereof shall be fair and reasonable compensation for the services so performed. The assessor and persons appointed to appraise and evaluate real estate as by this section provided shall constitute a board of appeals to whom tax payers may appeal in cases of disagreement over the valuation of real estate.

The county assessor of each county and two tax payers appointed by the county board who shall be without direct personal or monetary interest in any matter to be considered by said board shall constitute a board of appeals to which said tax payers may appeal in cases of disagreement over valuations of personal property. All members of the board except the county assessor shall be paid a fair and reasonable compensation upon a per diem basis to be determined by the county board. The county clerk shall be clerk of said boards and shall keep the minutes of the proceedings thereof but shall not participate in the deliberations or judgments of the said boards. Appeals shall be had to said boards, either for real or personal property, after application has been made to the county board for the equalization and evaluation of property. The procedure before either board shall be the same, and appeals may be had to the courts in the same manner for either real or personal property.

Sec. 20. All provisions of law relating to the procedure, duties, and appeals from the board of equalization shall apply to the board of appeals as herein constituted and the

terms "the county board of equalization" as used in Sections 77-1702, 77-1703, 77-1704, 77-1705, 77-1706, Compiled Statutes of Nebraska 1929 shall refer to and be taken to mean the board of appeals as by this act provided.

Sec. 21. That said original Sections 77-101, 77-111, 77-204, 77-707 Compiled Statutes of Nebraska 1929 are hereby repealed and that Sections 77-104, 77-201, 77-703 Compiled Statutes of Nebraska Supplement 1941, Sections 32-211 Compiled Statutes of Nebraska Supplement 1941, 33-129 Compiled Statutes of Nebraska Supplement 1941 and Section 44-1261 Compiled Statutes of Nebraska Supplement 1941 and Section 77-705, 77-709, 77-1701, 77-1911, 77-1912, 77-1913 Compiled Statutes of Nebraska 1929 and Sections 77-904, 77-905, 77-906, and 77-1601 Compiled Statutes of Nebraska Supplement 1941 are hereby repealed.

Sec. 22. If any part or provision of this act or of any section thereof shall for any reason be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect, impair or invalidate the remaining portion of this act and shall be confined in its operation to the part or provision of this act or section thereof directly involved in a controversy in which such judgment has been rendered.

Peoples Service Association, 324 Sharp Bldg., Lincoln, Nebraska.

[fol. 438] 1901 Q. Are you familiar with the bill testified to by Mr. Francis Matthews yesterday, and marked Exhibit 15, known as Legislative Bill 344, that is now pending in the Nebraska Legislature, proposed to amend Section 77-902, Compiled Statutes of Nebraska, 1929, striking out the exemptions exempting fraternal insurance companies from the tax?

A. I know about it, Sir, but I haven't read the bill.

1902 Q. Along that same line has the American Congress, to your knowledge taken cognizance of the income from radio facilities and other business activities of insurance companies exempt from taxes?

A. It has.

1903 Q. Please state about that.

A. That was one of the strongest inducements to me to try to get rid of the station, and I think it was concurred in by

all the members of the Board. The office of Mr. Morgenthau, the Secretary of the Treasury of the United States, recommend that revenues received——(interrupted).

Mr. Stewart: Just one minute, Mr. Bradshaw—may I interrupt? The plaintiff objects to any statement of recommendation by the Treasury Department for the reason that it is not the best evidence of either written or oral, hearsay, and it is not material.

The Witness: That is what was material to me.

Mr. Wells: That record is in this record and he is testi- [fol. 439] fying to his knowledge of it, which would bring it officially to the attention of the clerk of the Ways and Means Committee of the House; I want to show he had knowledge of that at the time, and a year before the consummation of this transaction.

A. (continued) Well, I was answering the question what induced me to sell.

1904 Q. That is right: I am asking you what induced you.

Mr. Stewart: Has there been a ruling on the objection?

The Court: You may proceed.

A. I knew from newspaper articles and otherwise that the recommendation had been made from the Treasury Department to have the income from radio stations and other business, I think, that was operated by exempt companies, subject to federal income tax. That, however, was not passed—the bill was not finally passed until the latter part of the year and I was constantly afraid it would be adopted, and think so yet.

1905 Q. Now, as the reason for attempting to dispose of the radio, have you experienced in the administration of this radio any difficulty in protecting its wave length, and any litigation concerning that matter, and when and where?

A. Well, for the entire time I have been president, the past ten years, we have had litigation about the position before the departments at Washington. In fact, we kept a firm of attorneys—when we owned the station we kept a firm of attorneys employed and on retainer constantly at Washington to protect our interests. We are on 590 [fol. 440] kilocycles, it has been testified, and it is in fact a very valuable kilocycle; others would try to get in—WKZO was one.

1906 Q. Where is WKZO?

A. Michigan—I have forgotten just the place, but there is an instance where we litigated that, oh, I should say six or more years before they ever finally got us down and got a license, and then only upon the condition of a directional antenna.

1907 Q. What is a directional antenna?

A. A layman's definition would be—I don't know what the technical one is—when the sound goes out it is sent in one direction as against another direction, that is, it is caught—they illustrate this sound like a hose shooting out, you know, a very crude illustration, but it would strike that antenna and go that way instead of this way, for instance, go in an opposite direction from Omaha (indicating).

Well, we went to the Supreme Court; we tried that before the Commissioner; had it before Congressional committees, had congressmen and senators looking after it but under committees trying to get something done, and then we finally went to the Supreme Court of the District of Columbia with it, and then the Supreme Court of the United States. That was one instance. We had applications from Georgia, three from Georgia at different times, two from South Carolina that I recall, may have been more: one from Florida, two from Alabama, one from Mississippi, one from Virginia—that is over the years I am talking about now—[fol. 441] and one from Arizona, two from New Mexico; then we had one that almost brought up international complications, from Mexico. That was just across the border, and finally we induced the FCC to give us the right, to let us use 5000 watts all the night after they had put on the regular program, after 11:30, then we could put on this 5000 watts and do the best we could to drown that station. They were operating in Mexico—I mean in Texas, Oklahoma and Kansas, and the principal business they would get was Texas, Oklahoma and Arkansas. That was Doctor somebody's station—I have forgotten now.

Mr. Massey: Brinkman?

Mr. Wells: Brinkley.

A. (continued) Yes, I don't know that it was his station but it was his plan behind it. Other stations, others with 50,000 watts, they would come in here and bother us right in Omaha, what we call backing it up. We tried to get rid of them; I think we might have gotten rid of them for a

consideration, but we didn't pay anybody. We finally made it so hot for them they concluded to go on another kilocycle.

1908 Q. Now, what other——(interrupted)..

A. May I just say this further: One from Georgia, for instance, and one from Wisconsin. Finally the Commission granted this, I mean New Mexico, and as a result it gets in on our territory here. In the east here this larger station gets into the territory we used to cover like a blanket; this [fol. 442] other over here gets into the southwest portion of our territory. And of course, we were doing our best to keep them from getting on the air and keep license from being granted to them. There have been many of those cases, and I probably haven't mentioned half of them that made application. Then there were other suits and other cases, for instance, one of the most recent ones and the most severe ones was the ruling of the Federal Communications Commission to the effect that if a Radio Station like WOW had a contract with the National Broadcasting System, like the National Broadcasting System, or if that system had two chains like a Red and a Blue, like they did have, when we made a contract with them or had a contract with them, they would cancel our license.

1909 Q. By reason of them having two——(interrupted).

A. By reason of them having two chains. Now, they went further in their program to provide that there should be no contracts between individual stations and these chain stations like NBC Red network, for instance, for the reason that they must open it up so any station could come in and contract for part of that time.

1910 Q. Has that controversy yet been settled?

A. Well, we joined with the National Broadcasting Company and another company there and brought a suit in the Federal Court of New York. It was tried there and dismissed on the ground that the three Judge Federal Court had no jurisdiction. We appealed to the Supreme Court [fol. 443] of the United States directly and they held last year that the Court did have jurisdiction and then it went back and, of course, was tried on the constitutional question of whether or not the Federal Communications Commission had a right to issue such an order, and we lost the case there in the trial of that before the Federal Court, and that was again appealed to the Supreme Court of the United States and is now pending there. However, we are not parties to that suit now because since we leased this

property we couldn't have any interest and advised the court we had no interest in the litigation, that is, the Woodmen of the World had no interest in the litigation, and as far as we are concerned we were dismissed as parties therein, but the case hasn't been decided yet.

1911 Q. On the voluntary asking the court dismissed the Woodmen of the World from that suit after you made this lease and turned the property over?

A. Yes.

1912 Q. What effect would the effort to interfere with the contracts have on the value of Radio Station WOW?

A. I could not answer that as intelligently as one who devotes all his time to the operation of the radio, but with my limited experience and knowledge about it I can see it affects it in this matter very seriously, for instance, if we had a contract running through the year with advertisers like Campbells soup and a lot of others I can think about, if we had to break out of there a half hour to let the Mutual [fol. 444] come in and carry on for a boradcast of something we had no contract for, the advertiser would not want to advertise with us, that is to say, if he couldn't have continuity of advertising he wouldn't have advertising.

1913 Q. Mr. Bradshaw, if a bill like number 380 should be enacted by the legislature of Nebraska prohibiting us from the operation of a radio, what effect would that have on the value of the radio, if it hadn't been disposed of before that thing happened?

A. Well, when the law compels you to sell anything, you have got to get just whatever you can for it, that is all.

1914 Q. Would it have any material value whatever under a legislative act requiring you to sell?

A. Well, it would have had no value to the Woodmen of the World; we would have had a loss in disposing of it. Is that what you mean?

1915 Q. That is right. What effect would it have on the value of this station if this tax matter had been placed in force on all the societies?

A. Well, accountants have differed among themselves and differed with me on it, but the differences run between $28,000 and I think $56,000. Of course, if I may be permitted to state how I reach my conclusion?

1916 Q. Yes.

A. In the first place there is a 40 percent Federal income [fol. 445] tax—every corporation here in town would have

to pay that; 40 percent of this net profit you are talking about would be immediately taxable and taken out of the earnings; for instance, if you were earning $200,000, 40 percent would be immediately taken out. That is Federal income tax. Then there is another tax: under the law of the Internal Revenue, which did provide when we were trying to make these negotiations that 95 percent of it should be taken—I think they have got that cut down to 90 now—so that 90 percent of the balance of $150,000 would go to the Federal Government, so that would only leave $15,000. If you would earn $250,000 you would only have $15,000 left. Why? Because the radio stood on the books at nothing.

1917 Q. I want to ask you right there, what was the original cost of the physical assets of the radio at the time you disposed of it? Do you remember?

A. No; I couldn't tell you about that because there is so much constant replacement, but whatever it was, land and houses and towers and machinery and engines and boilers and cooling and all the radios and all the music and all the things that they make records with, and all that, had been paid off.

1918 Q. Had it been charged off on the books?

A. Had been paid off and charged off. So, in other words, the whole thing would be taxable as far as we are concerned —as far as the Society was concerned, if they taxed it. But after all, that isn't the hardest thing about it. If they had [fol. 446] just taxed the radio that would not have made so much difference, but if they had taxed the whole fraternal Society because of that, then it would make a tremendous difference.

1919 Q. If a tax was imposed by Nebraska on the contributions, would that affect the business of this Society in the 44 other states in which it does business?

A. Yes.

1920 Q. Automatically under the reciprocal laws you would have to pay that?

A. I think in most states of the union there is what is called a reciprocal insurance law whereby Illinois, for example, they wanted to tax a lot of insurance business over there, and it would affect our company if we were going over there or any other company doing business, and in Nebraska, why, our insurance commissioner would levy a similar tax against insurance companies, and that has been sustained again and again.

1921 Q. You have related about your efforts in consideration of the disposition, and you have told about the interference with the power, the litigation you had——(interrupted)

A. Well, there is one other thing that I should say to answer your question, it seems to me, and that is you want to know why we were wanting to sell it.

1922 Q. That is the next thing now.

A. One of the strong reasons was we were getting to a place in this business where the public thought we were in [fol. 447] the radio business and did not think of us in the insurance business. I would meet people on the streets, and all the rest of the directors the same way, and they would be talking about the radio, and this man would be cussing about a political speech saying we were trying to promote somebody or against them, and then the news men would say we were one sided. The news gentleman doesn't even write the news he reads; it is written by the United Press; he doesn't even compose what he reads. Another would be cussing Foster May. They would be talking about the radio all the time and the things carried on there, and nobody thought about the insurance business.

1923 Q. What was the primary business of this Society, insurance or radio?

A. Well, we were organized as a fraternal insurance society fifty-two years ago, and we have been trying to carry that business on and we were having a lot of success with it, but we were trying to carry the radio, and I am telling you what I know about it.

1924 Q. Did the radio have any material interference with the directory forces in taking their time or any portion thereof?

A. Well, it took a great deal of time; it took a lot of expense; it took a lot of work and it took a lot of lawyers and it took a lot of worry. Now, the radio, Mr. Wells, had grown; the radio station isn't a little thing in one room down on the first floor.

[fol. 448] 1925 Q. How many employees has the radio station?

A. Seventy-two employees, and operating with an income of over half a million dollars, and it requires a lot of attention to look after a thing that is as ticklish as that sort of business.

1926 Q. How about the insurance on the other side? What assets do you have? I believe they testified it was $136,000,000?

A. Yes.

1927 Q. What is the annual income?

A. Well, the annual income is about $16,000,000.

1928 Q. How many camps have you in the United States?

A. Eight thousand, about that, maybe a little more or a little less, I wouldn't say.

1929 Q. The same executive officers undertake to operate the insurance business?

A. Yes.

1930 Q. And the radio?

A. Yes, sir.

1931 Q. In your judgment do you feel that was good business judgment for executive officers to have these responsibilities of this radio to the extent they have grown, when you should have served the insurance business? Did it interfere with the insurance business?

A. It did very seriously interfere with it, and latterly vastly more than it had formerly, growing out of the question of the investment of the income of the society and [fol. 449] its maturities. There was a time six or seven years ago you could go and buy all the municipal bonds you wanted to, and it was rather an easy job to do, and we could get those bonds on four, four and a half and five per cent basis, some of them even a little higher than that. Now, the market has got into such condition there are no municipal bonds for sale; you must seek investments in the commercial world such as railroads, utilities, gas and electric light, revenue bridge bonds, tunnel bonds and things of that kind, and it requires a lot more effort and a lot more time devoted to that business than it did five or six years ago.

1932 Q. The past few years have you experienced that difficulty in caring for the assets and investments of the funds of the insurance society?

A. Well, it has been running since, I would say, since 1936 anyhow that it has been so hard. You see, our business is all based upon the American experience table, with an interest assumption of only three per cent. We put it that low because we assume we cannot earn more than three per cent. Of course, we earn all we can, and as a

matter of fact have had bonds—we are earning more than four per cent on all of our investment, but a lot of it was bought way back yonder.

1933 Q. Have you had difficulty in investing your funds for the last five or six years on that interest assumption?

A. Well, it is a difficult matter to get three per cent.

1934 Q. Well, you say you base the interest assumption [fol. 450] at three per cent: how do you get four?

A. Well, because we bought bonds back fifteen or twenty years ago that are still running on the high rate of interest they have. For instance, I bought New York bonds back in 1935 and 1936 around 88, and I have sold them around 132—buy them at 880 and sell them at $1320.

1935 Q. The operation of this radio to the extent that it has grown, how does that interfere with the executive officers in making these investments?

A. Well, we have got to buy the bonds; we have got to make investments; and we have investments usually running upwards of, well, in the neighborhood of forty to fifty million a year—not that we have that much out of a year's income but figuring our matured interests are coming in. Week before last I sold Government bonds, one million dollars, and turned around and bought another issue—sold a short term bond and turned around and bought a two and one-half per cent.

1936 Q. Who makes the investments in this Society?

A. Well, we have a Finance Committee, Farrar Newberry and Col. T. E. Patterson, and an Advisory Committee.

1937 Q. Who are the advisory members?

A. Judge W. C. Braden, William Ruess and R. E. Miller, who were appointed to act in the event that any of us happened to be away.

1938 Q. Does it take all the effort and time of the finance committee, with your assistance, and your judg- [fol. 451] ment, to ad-quately keep these assets invested as security for the membership of this Society?

A. I think so. I was receiving a long distance telephone last night as late as ten o'clock, and had them calling up this morning.

1939 Q. Does that thing go on all day?

A. Day after day.

1940 Q. And is it that sort of thing every hour?

A. Well, of course, we may get an hour when they are not on our neck, all these men, you know. We just had a new issue of bonds——(interrupted.)

1941 Q. Let us get something that is not quite so important. Have you experienced any difficulty as between the employees of the radio and employees of the insurance department as to salaries and so forth?

A. Yes; that has been a difficult internal matter.

1942 Q. How?

A. Well, these radio employees are specialists; they work into being specialists, and they must be specialists in order to handle this business, and in addition to that they must work a lot longer hours. For instance, they are like newspaper men; we did have, WOW, when it was operating the station, we had reporters like a newspaper would, and some not giving so much time, perhaps, but they work long hours, and they wanted more money and they got more money. And some of them were in highly technical places, [fol. 452] were very well organized, and we had to pay them more money. It went even farther than that, Mr. Wells; we paid Johnny Gillin $16,000 a year and a lot of our directors are not drawing that much money, and I saw it was inevitable we would have to pay more, and I don't know, you get an employee up to a price sometimes that just isn't a happy situation, that is all.

1943 Q. Who fixes the salary of the officers of this association?

A. The salary of the elective officers, their salaries are fixed by the Sovereign Camp, which is the supreme legislative body of the organization, which meets biennially on the odd number of years. Now, that includes the president, the secretary, the banker, and auditor, the seven auditors and sentry and watchman.

1944 Q. Who are the officers elected and their salaries are fixed?

A. There are four of us.

1945 Q. What about the hazards in your mind that caused you to undertake to dispose of this radio? Did Government supervision enter into that?

A. Well, I would have to answer that by this explanation: when you are in the hands of bureaucrats, you just don't know where you are going, and we are in the hands

of the Federal Communications Commission, and they can cancel your license and do anything they want to, and the Supreme Court of the United States has been sustaining them in most of their rulings. Now, to that extent I say, yes, to your question, and I beg the pardon of the Federal [fol. 453] Communications Commision for calling them bureaucrats.

1946 Q. In entering into this lease of the facilities of the radio station, did the lease of the space in the building enter into that transaction as a part of the consideration to making up your minds to dispose of this radio?

A. It entered into the transaction to this extent, not that they let it appear before the Federal Communications Commission, but I explained to those who were getting the lease under no circumstances would a lease be given if they didn't rent the property and pay for it for fifteen years at the rate they are now paying, and Mr. Wells, they occupy a part of the basement, a good big part of it there; they occupy part of the first floor; they occupy nearly all of the second floor of that building over there, and that is a good large building; so while they are paying a good rent on the basis of the present day, it isn't an excessive charge for rent considering all the service that they get. We have to maintain, for instance, a great big room in the basement; we put in a steel tank there—I don't know how long the thing is, must be ten feet wide by thirty feet long and ten or twelve high, which we must keep full of cold water that must be used with the machinery we have to refrigerate those rooms; they run all night now, I think they are there practically all night, and all day Sundays, because our building isn't open to other folks on Sundays, but it has got to be refrigerated, air conditioned —and they get a lot of service.

[fol. 454] 1947 Q. In your judgment could you rent that space in the basement and on the first and the second floor to satisfactory commercial tenants at the price?

A. Oh, no, you couldn't possibly do it.

1948 Q. Why.

A. Well, in the first place they wouldn't pay as much. There are a lot of things in there that a commercial tenant wouldn't need or want, that they have got in the way of improvements and arrangements, and so forth, and then besides, the rate is a little more than for the common

ordinary operation of the building; for building that, when we were fixing the rate which we charged against the radio station, we included to fix it so within five years after that is done, that that rent that was charged would pay for all the extra improvements, for instance, we have got lots of brilliantly fixed broadcasting rooms; a lot of glamour was put around there that has gone into common offices since, so we made that charge.

1949 Q. You made special improvements at their cost and still maintain them under this lease for their benefit?

A. Well, we have been paid for these special improvements; we got that back from the rate charged, so they are paying that much more for that than we could possibly get from a tenant. I suppose that answers the question.

1950 Q. The charge is made that this lease is—may I use the term unilateral, the provisions are all in favor of the lessee and no protection given to the lessor?

[fol. 455] A. Yes.

1951 Q. You state that you drew the first lease and then that culminated in this lease which is practically the one you drew in a way: would you say that that is true or untrue?

A. Well, of course. the lease speaks for itself; I couldn't answer more than the lease says about it, but it was not designed to be unilateral. Of course, there were certain features in the lease that we tried to take care of in a reasonable sort of way, the Government taking it, the Government acquiring it, our bankruptcy agreement, things of that kind.

1952 Q. Other things in here, upon default of payment of any monthly rental that no salary above $250.00 a month should be paid: why was that in there?

A. Well, in practicing law I have discovered that corporations can get away with contracts by increasing the salaries so much and paying out everything in salaries so you have got nothing left to pay your debts with; I was not going to have these folks getting back a bit, take money out of that and not pay the rent.

1953 Q. And that is the reason it was in there?

A. That is the reason and the only reason.

1954 Q. The lease further provides they shall maintain adequate insurance in every phase of this business?

A. Of every kind of insurance that is issued.

[fol. 456] 1955 Q. Have they now all that insurance in force?

A. Yes; it is reported to me by the department that handles that, by the Accounting Department, that that is true. Of course, I haven't looked at it to see, personally.

1956 Q. Did you know in your mind that there were new scientific improvements in radio that would have to be installed almost immediately, at great cost to the operators of this station?

A. I think so.

1957 Q. And is that the reason provided in here that they should make those improvements as required by the Federal Communications Commission and maintain it as a high class radio station at their own expense?

A. Yes sir.

1958 Q. And that the equipped radio station, in that condition, at the end of fifteen years should be returned in toto to this Society?

A. That is right.

1959 Q. Without any payment of that expense whatsoever?

A. That is right.

1960 Q. It provides that upon any default for any reason that the Society takes back this station?

A. That is right.

1961 Q. Why did you put in this that you or the Society could make audits at least once a month or oftener or at any time they desire of stock books, expenses, income and so forth?

A. Oh, that is easy. For instance, they have paid their [fol. 457] January rent, their February rent and their March rent—suppose it was on the 8th of the month of March and they hadn't paid their March rent—why don't you pay it? Well, we haven't got the money or some excuse given, and we will put a man there to see how much money is taken in and what is going on, and we will know how much they are taking in, and we will pay on their account until we do get it.

1962 Q. You will see that that much rent is paid for this space and for the facilities of the radio station?

A. That is right.

1963 Q. The charge is made, Mr. Bradshaw, that the consideration charged and received is grossly inadequate; are you familiar generally in your position with the value of radio stations and what the lease will sell for as fixed by the Federal Communications Commission?

A. Well, I know something about it; I don't know all about it.

1964 Q. What would you say—did you make this in good faith and believe that you received an adequate consideration for this transaction?

A. Well, we thought we were getting a very good return.

1965 Q. On what basis.

A. Well, on the basis of a sale I was trying to get $850,000 for it, where we sold it outright. As I explained a while ago we try to get three percent interest, definitely on all the money we have. The present value of all we get from this lease is $910,000.

[fol. 458] 1966 Q. You mean then the radio facilities alone without the space rent?

A. Yes; then we get it back at the end of fifteen years, and in addition to that we kept this law suit which you think at least we can win against ASCAP; that is in there and we have the big space in the building rented at a good rent.

1967 Q. For $2117.00 a month?

A. Yes; I think that is the figure.

1968 Q. For fifteen years?

A. Yes.

1969 Q. The charge is made that this lessee is totally non-financial, as we usually put it on the street, unable to carry out this contract and pay this rental: what do you say about that?

A. Well, I know that the Federal Communications Commission wouldn't approve the license until they had a certificate from the bank over here that they had $75,500 on deposit in the bank, and I know they had it because I saw the checks delivered. In addition to that then they have $25,000 which they got worth the value of the accounts.

1970 Q. Now, it is charged that that was a gift: did your board make that as a gift?

A. Who did we give it to?

1971 Q. To this new organization?

A. Oh, it was not a gift anymore than the typewriter was a gift or the contract with the National Broadcasting

Company for $340,000 was a gift, but they have a hundred [fol. 459] thousand dollars in cash to start with, to begin operating with.

1972 Q. In your judgment do you think they will be able to carry out this lease contract and maintain it, and pay this rent?

A. I do. I think they can do it easily.

1973 Q. Do you think the provisions of this contract—as a lawyer—adequately protects the Society?

A. It adequately protects the Society as far as it can be protected with the character of the enterprise. I don't know how long radio is going to last, and I don't know what is going to happen with it, what the Government is going to do with it.

1974 Q. It is undertaken to be proven here that you invited in the organization of this immediate lessee, Mr. Guy Myers?

A. I did.

1975 Q. And Mr. Harvey Milliken?

A. I did.

1976 Q. And Mr. Mike Meyers?

A. I did.

1977 Q. To invest in this enterprise, and that you sent Johnny Gillin out to try to organize?

A. I did.

1978 Q. What was your purpose in that?

A. Well, if anybody knows anything about radio, it is Johnny Gillin, and if he knows people who would be interested in becoming connected with the operation of radio, [fol. 460] it is certainly John Gillin.

1979 Q. Did you have any other purpose than a satisfactory lease in inviting these men?

A. Oh, no; they were the only fellows we could get; we tried others, and even up until the day they were incorporated at that meeting, two of the principal fellows failed them, $25,000.

1980 Q. Who were they?

A. Well, Clarke Swanson and——

1981 Q. Horace Erickson?

A. Yes, Horace Erickson. It looks easy now when you look at this part but I tried for four or five months there as hard as I ever worked in my life to get anybody to be interested in taking a lease.

1982 Q. You commenced with Mr. Cowles of Des Moines and from there——(interrupted).

Mr. Stewart: Just a minute: let us not have any leading questions.

Mr. Wells: I beg your pardon: you did it so much you got me off.

Mr. Stewart: Well, that is an easy way to explain it, to pass the buck to somebody else.

1983 Q. Relate again the different ones that you did undertake to interest in this transaction, briefly now, without going over all of them.

A. Well, I think I stated the principal ones I talked to [fol. 461] about it was the Swansons; there were three of them. I think I explained yesterday the reasons.

1984 Q. Well, I don't want the reasons now.

A. I don't know of any except those I have mentioned, and those who are now connected with the institution. I asked Dale Clark if he knew of anyone in his bank who would be interested. I asked each one of those fellows if they knew of anyone else that would probably come in, because it was a difficult matter to get anybody interested in it.

1985 Q. Now, when you invited Jake Isaacson and Harvey Milliken to investigate it, and Mike Meyers to investigate this, and Johnny Gillin to try to interest the Swansons and the Ericksons and the others in it, did you have in your mind to have any interest in this in any way whatever?

A. Oh, no; no, no, not a one of them suspected that I wanted any interest in it; that matter was never talked.

1986 Q. Was the question ever broached that you should have any interest or any member of your family or any of your friends or associates?

A. Yes.

1987 Q. In this matter?

A. Yes.

1988 Q. All right, what was it?

A. Mr. Carl Swanson said "Aren't you going to have any interest in it?" I said "Not a dime." He said "Well, I think you ought to." I said "No, I cannot have any interest in it; I am representing this matter in a fiduciary [fol. 462] capacity; I couldn't possibly have any interest in it." He said "Well, I would be much more interested

in this matter, if you were in it it would satisfy me." I said "Well, I cannot do it."

1989 Q. You knew legally you couldn't have?

A. I knew morally I couldn't be interested in it, and it is a plain matter I have given my life in the Woodmen of the World, everything I ever did or dreamed of was for the Woodmen of the World without anything coming to me in an improper way, so why should I begin at this age of life trying to get something? It is silly.

(Short recess taken—change of reporters.)

[fol. 463] 1990 Q. Mr. Bradshaw, you are a member of the Board of Directors of the Omaha National Bank?

A. I am.

1991 Q. And have been for about how long?

A. Six or seven years.

1992 Q. Did you ask the bank or undertake to induce the bank to loan Johnny Gillin any money with which to take stock in Radio Broadcasting Station WOW, Inc.?

A. I did not, but I think that ought to be explained further by stating that Mr. Dale Clark called me up when the application was made for the loan and asked me about Johnny Gillin and about the loan.

1993 Q. What did you advise?

A. I answered his questions.

1994 Q. What did you tell him?

A. I told him that I didn't know whether or not Mr. Gillin could produce bankable paper. Well, he said it was to go into the radio business, and I said, "Yes", and then he said, "What do you think about that?" Well, I said, "It is problematical, Mr. Clark, about the stock; he is buying stock." Well, he said, "Do you believe that the corporation would be all right and the stock would be good security?" And I said, "I would decline to make a recommendation of that kind. I don't know. It is a new enterprise, and a new venture. I don't know whether it will or not. The radio has been making money and I hope it will continue to make money, and I believe it will be paid, but I [fol. 464] would not say that it was bankable paper."

1995 Q. Did you advise him to make the loan?

A. Oh, I told you just what I told him.

1996 Q. You did not indorse for him or sign the note as surety?

A. Nor recommend it.

1997 Q. Did you aid or assist by influence or your personal credit or of any other members of this corporation to obtain the money to invest in this stock?

A. I did not aid or suggest that the loan be made to anyone else. I did not put my personal credit to the advantage of anybody connected with it at all.

1998 Q. It has been testified in the evidence introduced in chief in this case that there was a conversation between you, Mr. Gillin, Mr. Ruess, Mr. Munger and Mr. Bing Smith about a week or ten days before this lease was consummated. Do you remember that occasion?

A. I remember an occasion of that kind, and in speaking with those gentlemen, and it seems to me just now that it was longer than a week before that.

1999 Q. Well, a short time before the lease was entered into?

A. Well, sometime before, yes.

2000 Q. Did you refuse to consider any proposition, and if so, the reasons why, if any was made?

A. I didn't refuse to consider any proposition. I said to them that with reference to the proposition that I was committed to another group and I would not be able to [fol. 465] entertain or make any contract with them until I had determined whether or not the other group would carry out the tentative agreements which we had, but that if for any reason they did not go on I would be glad to confer with them.

2001 Q. What was that proposal, the terms of it?

A. They didn't make any definite proposal. I was first insisting on finding out whom they represented, as to whether they were representing themselves or whether they represented Mr. Doorly or the World-Herald, and was assured by both of them again and again that they were representing the World-Herald. They suggested that they would like to trade in the station down there——(interrupted).

2002 Q. KOWH?

A. KOWH, which they owned, as against the Woodmen Of The World, the WOW station. I raised another objection; I said, "If you were to take over the property you want to—you would not want to take over our leasehold interest here."

2004 Q. Space?

A. Space. And they said, no; they had space in their own building down there and they would not want to do it, and I said I would not want to dispose of it. And they said, "Well, you know, we have got plenty of money, we could pay cash right now." I said, "Yes, I know you have, that is all right, but if I made my contract with you I would expect to get my money, would not be any trouble about that, but I am not going to give up the leased space in this building."

[fol. 466] 2005 Q. That was one reason why you would not entertain it?

A. Yes, sir.

2006 Q. And would you consider a trade of stations?

A. I told them that I was not interested in trading stations; what we were trying to do was to get rid of a station.

2007 Q. And not take another?

A. I didn't want the other. I wouldn't take theirs at any price, because I didn't want a radio station.

2008 Q. There was no offer made, suggested amount or anything?

A. No offer stated with reference to amount or price, or amount to be paid in difference in exchange, if anything. Nothing of that kind was stated, because I had told them that I was under commitment to another group.

2009 Q. There is a provision in here, in the lease, about the transfer of the good-will of the station. How did that enter into it, what effect did that have on it?

A. Well, Radio Station WOW as a part of the property of the Woodmen Of The World had a wonderful, fine reputation and a lot of good-will. We were trying to pass on all these to the new group.

2010 Q. For what purpose?

A. Well, so that they could successfully operate the station and make the money to pay the lease, pay the monthly lease.

2011 Q. You were interested in their succeeding?

A. Oh, yes, vitally interested in their success.

2012 Q. You stated that you were interested in Gillin [fol. 467] being a prominent stockholder in the new organization. Why?

A. I was interested in Gillin having some interest in it, and that he would stay with it. I would not lease that sta-

tion to anybody that I know of anywhere without a tremendous cash payment, without Johnny Gillin was going to run it—now, let's don't dodge the issue—because I wouldn't trust it to anybody else to run the station and make the money out of it that I know Johnny Gillin would.

2013 Q. You felt that others could not have made the success that Johnny could have gotten?

A. Yes, sir.

2014 Q. But if Johnny was going to lease it you would know how it was going to be run?

A. Yes.

2015 Q. The lease would be successfully carried out?

A. John Gillin did a marvelous job with us in building up the station.

2016 Q. It is charged in this petition against you and your directors that the stockholders and Board of Directors and officers of Radio Station WOW, Inc. had taken over this station and this lease to be controlled and dominated by the officers of the Woodmen Of The World. Is that true?

A. The officers of the Woodmen Of The World have not got anything in the world to do with it, the Radio Station WOW, and none of them have tried to exercise any judgment over it. I would not do it, and knowing the group [fol. 468] as I do, I know they couldn't do it.

2017 Q. If they wanted to?

A. Yes, sir.

2018 Q. It is charged here in this petition that Johnny Gillin is a protege of yours—whatever that means.

A. Well, I did not promote him, and further than that, when he came to us some years ago he exhibited a good deal of brilliancy and energy in the radio business. One man may be a good lawyer and he might not be a good radio man. Another man might be a fine judge and he might not be much of a mechanic. But Johnny fits radio, and radio fits him, and he can get the most out of it. As was described here the other day, he can get business. He is as expensive as the dickens and spends an awful lot of money, I have been sick over his expensive bills, but he gets results, and after all I suppose that is what we are most after.

2019 Q. Were the results that he got in the operation of the business of the radio the reason for insisting on Johnny having it?

A. Yes, sir.

2020 Q. Would you favor Johnny Gillin or anybody else to the detriment of this Society or its members and the assets of this organization?

A. Oh, no. Nobody who knows me would think that I would do anything detrimental to the Woodmen Of The World, and I wouldn't favor anybody, but I am favoring the Woodmen Of The World when I am insisting that Johnny Gillin run the station.

[fol. 469] 2021 Q. It has been testified to here by various witnesses as to his skill and ability and success in the operation of this station, and has made it what it is, and his salary has been fixed at $25,000.

A. Yes, sir.

2022 Q. Did the Woodmen Of The World ever pay him any such salary as that?

A. No. We paid him—we paid him $16,000 a year—was the highest.

2023 Q. For how long had you been paying that?

A. Oh, I suppose about a year; not more than that.

2024 Q. What had you paid him previous to that?

A. We had paid him fifteen, and then below that, paid him twelve and ten and eight and seven, and—well, I think he went up from about three thousand, thirty-six hundred.

2025 Q. Mr. Bradshaw, what interest do you have, if any, in the Consumers Public Power District getting the control of this station and seeing that programs were put over in order to purchase the Nebraska Power Company?

A. I have no interest in it. Anybody that has got sense enough to know the law knows that under the Federal Communications law that you cannot favor an institution. A newspaper can do it, but the radio cannot do it. You can only sell your time. Or if you give time, you have got to give time equally; and if you sell time, you have got to sell it equally.

2026 Q. That wasn't any purpose in your mind or of the [fol. 470] Board of Directors?

A. I never thought of it.

2027 Q. Do you have any interest in the Consumers and the Nebraska Power deal?

A. I had no interest in the Consumers, and never thought the station would have any, and it hasn't any.

2028 Q. Was that ever talked over or thought of as any purpose in making this lease?

A. No, it was not considered for the least, or ever thought of.

2029 Q. Was it ever discussed among the members of the Board of Directors of your Society?

A. No, never.

2030 Q. Or did you ever discuss it with the stockholders of Radio Station WOW, Inc.?

A. It never was mentioned.

2031 Q. Before or since the lease was made?

A. Never was mentioned.

2032 Q. Never was mentioned?

A. Except here in the court room, is the only time I have ever heard it mentioned.

2033 Q. Did you ever discuss the matter with Mr. Guy Myers?

A. Never. Mr. Guy Myers knows that the station could not represent—could not turn its facilities over to any one person as against other persons.

2034 Q. Did you ever discuss it with your son-in-law, John Dawson?

A. Never.

[fol. 471] 2035 Q. Who represents various banking facilities?

A. Never mentioned it to him.

2036 Q. Never mentioned the lease to him?

A. Never.

2037 Q. Did you ever discuss it with these New York lawyers that he has been talking about here?

A. I never saw the New York lawyers; I know nothing about them; I never heard of them.

2038 Q. Did y u ever discuss it with Mr. Paul Massey, attorney for Mr. Gillin, who helped prepare this lease?

A. No. I did not have the honor of intimate acquaintance with Mr. Massey.

2039 Q. Mr. Bradshaw, it is charged that you concealed the purpose of the disposition of this radio station from the members of this Society. Was there any concealment?

A. No, there was no concealment.

2040 Q. What is the fact about it?

A. Well, it is just about like every other bit of business that we transact, we cannot take it up with the members;

that is why the officers are elected and paid salaries, to handle the business, because we could not take that up with 300,000 members.

2041 Q. You mentioned, I believe this morning, that within the past week or two that you sold more than a million dollars worth of government bonds, and purchased a million. Did you ever think it advisable or was it considered proper or necessary to discuss with the members [fol. 472] transactions of that kind in the investments of the Society?

A. It would be entirely too late. Investment opportunities come up and you must act now, within a very few minutes or hours, and it is just too late; that is all there is about it. And you could not discuss it with members.

2042 Q. Was there any withholding of this information from the members of the Society?

A. On the contrary, I have advised all the members—I am talking now about—we've got the head Camps, for instance——(interrupted).

2043 Q. What are the head Camps?

A. Well, the head Camp is an organization in states, in Texas or Arkansas or Mississippi, there would probably be—in Texas 500, 600 members, and more members of the families besides; in Alabama 200 or 300; in Georgia 300 or 400. Every other year in those meetings, and every year in every other year in the Sovereign Camp I have explained to the membership the situation with reference to its finances and with reference to the radio station. I boasted that the radio station made enough to pay all the salaries of all the officers and all the expense we had.

2044 Q. Did you make that report to the Sovereign Camp?

A. Yes; yes, I made a report to the Sovereign Camp, and then I told them—but you must get this, that I am not putting this stuff in printed form, I did not go in there and say the radio was earning this much money, at the proceed- [fol. 473] ings before the Sovereign Camp, as every man here knows; we told them we earned a tremendous amount of money, so I am not putting down on paper to publish to the country, because I don't want to get designing people to get a hold of us and start suits against us for situations and start tax programs against us. There are those designing people who will get out and start a suit for any

kind of purpose at all, in the hope of getting some money for themselves.

2045 Q. I will ask you this question, then: There was no design, no purpose, no effort to conceal this matter?

A. Oh, not a particle.

2046 Q. Of anyone that had an official interest in the matter?

A. If you had the Camp members here and asked them that, they would say that I told them again and again. But my reports are pretty general, and not gone into in detailed figures with reference to that. You just start trouble.

2047 Q. It is charged here that you and your six co-defendants dominate and control this Society and its Board of Directors. State whether that is true or is not true.

A. I don't believe I understand the question.

2048 Q. It is charged in this petition that you and your seven individual co-defendants here, members of the Board, dominate and control the Board of Directors, and formulated this sale or lease contrary to the best interests of the Society.

A. Well, I don't believe that any person or any group of [fol. 474] persons dominates or controls the Board of Directors. We are unanimous on our opinions on the Board of Directors. Now, we may have a lot of pretty warm scraps in the directors meetings to determine whether or not we will or will not do certain things or pursue a certain policy or issue a certain kind of policy, or adopt a certain other policy with reference to members and with reference to new folks, and it may be rather acrimonious at times, but when we get through, it is all over.

2049 Q. Did you disclose to the Board of Directors, the members in regular session of the Board and out of the Board all the facts regarding this lease?

A. I told the members of the Board everything that I could think of that would bring them up current, with current affairs, and talked to Mr. Ruess, who was giving most of his attention to the radio; I would say to him again and again, "Well, I have just had a conference with these folks, and had a conference with that group", or "I saw somebody yesterday", and I explained in detail with him just as I went into detail with the members of the Board of Directors when they were together and separate.

2050 Q. Did you disclose to and give that committee, consisting of Judge Hines, Mr. Mooney, Mr. Braden and Mr. Plunkett, all the facts which you had at that time regarding this lease?

A. Yes; I gave them all of it, and I said this, "Furthermore, I wish you would take that and look it over, and make any suggestions that you can, and if there is anything you think we ought to do, that should be done differently, I [fol. 475] wish you would suggest it." And when they came in with the report, with the written report in here, and the report that they made, and I call this to your attention—they said, "There are one or two things that we think should properly be in the lease." Mr. Hines said, "I have had some experience in bankruptcy business." And he said, "Here is a memorandum of two or three things that we think will possibly be put in the lease." And we discussed those, these four lawyers, and they were included in the form of lease that was drafted.

2051 Q. Were the tentative form of the lease that you had been considering and preparing, given to them?

A. Oh, yes; all the papers, everything in the world, correspondence and everything. All that I knew about it was turned over to them.

2052 Q. The papers which you turned over to them disclosed all the matters that you had?

A. Yes. They didn't say so in their report, but they had some others than that, had made an investigation of it, and made some personal inquiries. They had it for several days. They didn't take it out and go out and write a report and come right back. I don't know how many days they had it under consideration. Our Board meetings last a week or ten days. We don't meet but two or three times a year.

2053 Q. Did the Attorney General or the Insurance Commissioner of this state make any demand or request an [fol. 476] investigation regarding this matter.

Mr. Stewart: That is objected to as incompetent, irrelevant and immaterial.

Mr. Wells: It is an issue in this case.

The Court: The question is whether he made any demand.

Mr. Wells: Yes, sir, or request for an investigation.

The Court: I think he may show what he knows about it.

2054 Q. Do you know whether they did or not?

A. Well, I know that Mr. Frazier said that some information—(interrupted)

Mr. Stewart: I object to what Mr. Frazier has held as not the best evidence.

A. (Continuing:) Well, I know that he called up and asked some questions about it.

2055 Q. Did he make any inquiry of the officials of this Society about this matter when it appeared in the press?

Mr. Stewart: Object to what Mr. Frazier has held as not best evidence.

The Court: He may answer.

A. Yes.

2056 Q. After the suit was filed?

A. Oh, no; that was before the suit was filed. I don't recall he ever asked any questions after the suit was filed. [fol. 477] Somebody had given him some information about it as soon as the matter was published in the press with respect to the lease having been made, and he then made a request of us to know what was happening, why it was, or something about it.

2057 Q. He did officially ask about the lease?

A. Yes.

2058 Q. Then took no further action, as you know?

A. Well, Mr. Newberry could answer that question. I think Mr. Newberry saw him and talked with him about it, wrote to him about it or talked to him on the phone about it.

2059 Q. You never saw him?

A. I never did. But that was before the suit was filed.

2060 Mr. Crossman: May I inquire, Mr. Stewart—this issue is squarely joined, and may I inquire if you can stipulate to these facts, that the question of this lease, which is involved in this case, was not presented by the insurance commissioner to the attorney general, and that the attorney general has not given notice to the chief executive officer of the Woodmen of the World Life Insurance Society with reference thereto, and of his intention to institute proceedings by reason thereof, subject to whatever legal interpretation you may give to those facts?

2061 Mr. Stewart: No, I cannot stipulate as to what the insurance commissioner or the attorney general may have done, and what may have occurred between them, because

[fol. 478] I don't know one way or the other; I am not advised.

2062 Q. As far as you know, the attorney general has instituted no proceedings again-t this Society by reason of this transaction?

A. No.

2063 Q. It is charged in this action that Mr. H. E. Milliken, a stockholder in Radio Station WOW, Inc. does a lot of printing for the Woodmen of the World.

A. He does.

2064 Q. State whether or not that contract for printing was given to Mr. Milliken's company on a competitive or non-competitive basis.

A. It is all competitive. We advertise each year and receive bids for all the printing, and it is granted to the lowest and best bidder on a contract.

2065 Q. In each and every instance that Mr. Milliken has received this contract, has he been the lowest as well as the best bidder?

A. He has.

2066 Q. How are those bids advertised?

A. They are advertised in our magazine, which goes to all our members and to a lot of the trade.

2067 Q. Trade papers?

A. Yes, sir.

2068 Q. And are there printers and printing companies who make bids in competition with Mr. Milliken?

[fol. 479] A. Oh, yes.

2069 Q. It is further charged that there is unusual business friendship between you and the Society and Mr. Mike Meyers.

A. Yes. Well, you want to know—(interrupted)

2070 Q. State that relationship and whether that had any influence in this transaction.

A. I have known Mike Meyers for a good many years. I have two daughters, both of whom were in the university, one of them taught for a little while—I mean University of Nebraska. Mike Meyers was down there in school, I knew him, and John Dawson, and Quigley, and major somebody down there, I cannot think of his name—Hob Turner. I met the boys down there, and I have known them for that time since, and the major and Mike was one of the group down there, Jack Frazier—Jack was not in college. Mr. Meyers came here and has been the representative of some bond

house, for some one or the other, for some time, sometimes independent, as I understand. And I think he is a smart, intelligent, decent sort of a fellow; I know his wife very well and the two children. She is the daughter of a former United States Senator, and I have the finest relations with Mr. Meyers, but no more so than F. R. Kelley, who was here yesterday representing Stranahan, Harris Company, or Morris Mather, who represents him, or a number of others that I could mention here in town. Shorty McCague —pardon me, I should not say Shorty. What are his initials?

[fol. 480] Mr. Massey: Lawrence.

A. (Continuing:) Yes; Lawrence McCague.

2071 Q. Mr. Meyers testified that his account with the Woodmen of the World was one of the best he had. Can you recall about the amount of bonds that the Society bought through Mr. Meyers last year and the year before?

A. Well, I have not looked at the books, but I doubt if we bought $200,000 from him last year, but if it were $400,000 it would be just the same, I would be glad that I could give an order for $400,000.

2072 Q. You say that you probably purchased through him or his firm some $200,000 or $400,000?

A. Yes.

2073 Q. What was the approximate amount of bonds that was purchased last year from all sources?

A. Oh, I would say between forty and fifty million.

2074 Q. And that is the part that Mr. Mike Meyers plays in the picture?

A. Yes. I could give you the amount proportionately that we bought from other folks around here in town, McCague and others.

2075 Q. Did you make any effort to have the Board of Directors authorize you to lead this transaction, undertake to organize and secure the possession or lease for this station?

A. I did not ask them to direct me to do it, but they did direct me to do it.

2076 Q. Did you undertake faithfully, and in good faith, [fol. 481] to carry out those directions?

A. I not only undertook it, but I did.

2077 Q. Did you inquire of and investigate every company and every individual that you thought would be interested in securing this station by sale or lease in order to get an advantageous contract?

Mr. Stewart: That is objected to as leading and suggestive.

The Court: Overruled. I think you can answer that.

A. I think I answered the question yesterday.

Mr. Stewart: Again today. Just been gone over twice.

The Court: He may answer.

A. (Continuing:) As I explained yesterday, I investigated every source where I thought I could get anybody interested, and in addition to that I insisted that Mr. Gillin, who readily, in 1941—that is back there, contacted the radio people in the United States, and particularly the National Broadcasting Company, which owns stations, it is buying stations, and had some leased, and it was installing and selling and buying stations, and asked the other people to find out what they would do in the matter, and what advice they would give, and conferred with them personally, with the president of the National Broadcasting Company, Scotty Russell, who used to be on the South Side, I know he [fol. 482] is the biggest man in Washington, and several others I could mention.

2078 Q. It is insisted that the officers and directors of the Woodmen of the World did not make an effort to dispose of this station on the best basis for the interests of the Society. State whether that is true or not.

A. Well, I know that they made and did their best to dispose of it at the best possible price and to the best possible customer.

2079 Q. It is charged that you and Mr. Gillin acted in a dual capacity, you representing the Woodmen of the World Life Insurance Society on one hand, and WOW, Inc., on the other. Were you representing that corporation in any way in the making of this lease?

A. I did not represent anybody whose interests were at all contrary to the interest of the Woodmen of the World in any way at any time for any purpose anywhere in the world, but I did work with Gillin and I tried to and I urged him and tried to confederate with him in order that we could get ahold of a group who would take it over.

2080 Q. What object did you have in that matter other than the interests of the members of this Society?

A. None whatever. I thought it was to the best interests of the members of the Society, and furthermore I thought that was what the Board of Directors wanted me to do.

2081 Q. Did you think that was achieved?

A. I did.

[fol. 483] 2082 Q. Is there anything in your judgment in the provisions of this lease that are unfavorable to the interests of this Society or to its members?

A. I think not. There are some provisions in there, of course, that—a lease works both ways, you know, and each fellow is trying to protect himself in there, but I think as far as the lease is concerned that it is as good and as fair as one could hope to get in negotiating and reaching a conclusion. I think of no section in there, or no line, or no word which is detrimental to the Woodmen of the World.

2083 Q. It has been testified here that the coverage of this radio station is about two hundred miles radius from Omaha. What percentage, approximately, of the members of this Society are in that radius or coverage?

A. Oh, there would be about between five and six per cent.

2084 Q. Where are the greater numbers of the members of this Society living?

A. New York, Pennsylvania, Ohio, Virginia, North and South Carolina, Georgia. And these are the different states now, Georgia and Florida; Florida is smaller in amount; Alabama, Mississippi, Louisiana, Texas have smaller numbers in Oklahoma, but larger than in any of these other states, Oklahoma, Arkansas and Kentucky, Tennessee. We have a small membership on the Pacific Coast, in Oregon, Washington and California, some little in Utah and Idaho.

2085 Q. Are the members in those states you named [fol. 484] directly served by this station by hearing its programs?

A. Oh, no; no.

2086 Q. Normally they could to a limited extent?

A. Yes, when there were no competing stations and any nearby wave lengths; but now you cannot—we do well to cover this station, we have only got good service within a

2087 Mr. Wells: I think I have about covered it in chief.

2088 The Court: How far is Kalamazoo from Omaha?

2089 Mr. Wells: Michigan.

The Witness: Michigan. It is about six hundred miles, I would say, directly.

2090 Mr. Massey: Probably eight hundred.

2091 The Court: There is interference from that station.

The Witness: That is WKZO, which is at Berrien Springs, which is about—it is under one thousand miles. We have tried—well, I have answered your question.

2092 The Court: It was testified here that you had some trouble with it.

The Witness: Yes, it interferes with us. You see, we are on a regional channel, which differs from a radio band. There is one at Boston, I think WEEI Boston, the one here, and one in Spokane, and we are all on the [fol. 485] same band. We are more than a thousand miles apart, you see, considerably, and they all operate well, but this Kalamazoo station——(interrupted).

2093 Q. WKZO?

A. WKZO is nearer to us than that, and was causing us a lot of trouble.

2094 The Court: You do attempt to serve a good deal farther than two hundred miles, then?

The Witness: No, not regularly. We can be heard that far. The trouble about stations being there is that it backs up right here in our own back yard. It is a strange thing, of course.

2095 Q. What is the power of the WKZO station?

A. I cannot answer that, but it is on the same kilocycle we are, but I don't know the power, but I think it is one thousand, about one thousand, I believe.

2096 Q. Did the engineering staff desire that that power come within two hundred miles of this station?

A. Oh, it comes a lot closer than that. That is not the trouble, it is not a question of how far it comes, but it overlaps, you understand, so that you cannot hear and stops your wave length up close to you, and two stations that way, close together, will just be ruining each other when they are on the same kilocycle, if your Honor please.

2097 Q. When they are so near together?

A. Well, I would not—I don't want to say that. I am [fol. 486] going to stick and say on the same kilocycle, and I am not certain on that. Anyhow, Gillin would know all about it, and the engineers would know about it, but I don't know so much about it.

2098 Mr. Crossman: Does your Honor have any questions?

2099 Mr. Wells: I believe we rest.

2100 The Witness: Your Honor, may I make a suggestion to counsel, please?

2101 Mr. Wells: Yes, sir.

2102 The Witness: You have not interrogated me about the question of interest in that Society, and I am charged here with rather serious crimes and misdemeanors.

2103 Q. Mr. Bradshaw, are you or any member of your family interested directly or indirectly, secretly or in any other way in any of the stock of the Radio Station WOW, Inc.?

A. No, I am not interested in it, neither is any member of my family here, or my daughters or their families; none of us are interested in the slightest degree in the stock or any income from it, have no interest in it whatever, openly or secretly, or any other way, and never have had any interest in it.

2104 Q. Is there any other understanding, directly or by in-uendo or by suggestion with any member or stockholder of Station WOW, Inc. that you will hereafter be entitled to secure any of that stock or any interest of that stock, or any of your family, or income therefrom?

A. There was no agreement or understanding, directly [fol. 487] or indirectly, that I or any member of my family shall have now or at any future time any interest in the capital stock of that company or any interest in the proceeds of the capital stock of that company, or any interest whatever, directly or impliedly in the company.

2105 Q. I will ask you this question: Would you have consented to have made that lease with any member of your Board of Directors having any stock in it?

A. I would not have agreed to it, because for obvious reasons, but that would not have been necessary, Mr. Wells, now, because none of them would have had any interest, he wouldn't want any, he wouldn't take any interest in

it. It is far beyond the limits of any guess-work, because they just would not have any interest in it.

(At this point a recess was taken from 11:45 o'clock A. M. to 1:30 o'clock P. M. this day.)

2106 Mr. Crossman: A formal matter. Mr. Pakes has now produced the excerpts from the minutes of the Board requested yesterday afternoon by Mr. Stewart, and can we not now identify them and have them in the record, so that any further inquiry about them may refer to the exhibits, which are copies substituted in lieu of the original records, said copies being marked Exhibits 16 to 25, both inclusive.

[fol. 488] De E. Bradshaw resumed the witness stand and testified further as follows:

Cross-examination.

By Mr. Stewart:

2107 Q. Mr. Bradshaw, what was the purpose of establishing the radio station?

A. I think that it was to attract the attention locally and to probably be the first in a play thing of the country at that time. You see, that has been about twenty-two or three years ago, and radios did not amount to much then. That was the time when you listened to it with hooks in your ears and had crystal sets.

2108 Q. Any other reason that occurs to you as to why the station was established?

A. Well, it was thought that it would be a good advertising medium and at that time to attract attention, and at that time it was very, very necessary for us to divert the attention of the public and our members from situations that then existed.

2109 Q. Was one of the purposes of establishing the station to create good-will for the Society?

A. Well, I would say yes, probably, although I don't think it was thought of in that way.

2110 Q. Has the station created good-will for the Society?

A. Well, it has acted both ways. For a while, it was, I think, quite favorable, and then, of course, as competition came in in the various places throughout the United [fol. 489] States, other stations arose, why, it lost interest.

I am speaking now of the membership of the Society at large. I suppose that is what you have reference to. You don't mean good-will here in town, do you?

2111 Q. Well, I mean good-will generally without limitation to the City of Omaha.

A. Well, it was a novelty and very interesting and members talked about it, and others talked about it; it had an appealing effect.

2112 Q. When did it cease to promote good-will for the Society?

A. Well, that would be very difficult to say, just at the period—I would say that it was not a definite thing to be promoting good-will for the Society, but it was definite in that it could be heard by a large part of the country, or by a large part of the membership. And then when they couldn't hear it, they were disappointed. And finally it grew to be a local thing. A radio station is a local thing; it does not extend over a big territory.

2113 Q. Go ahead.

A. Well, when it was limited, when its listening public was so curtailed, and the distance which it could reach, why, it lost any potency with the membership and with the public in general.

2114 Q. In your opinion, was it creating good-will for the Society up to the time it was leased to the new company?

A. Well, I would—that is so mixed that I would hate [fol. 490] to say that, because—you mean good-will for the Woodmen of the World Life Insurance Society?

2115 Q. That is right.

A. Well, I would say that it became more of a detriment to the Society, and has for the last, oh, four or five years, than it has been a definite benefit. Now, that is locally. When you get away from here, why, it has no influence at all one way or the other, because it is not heard.

2116 Q. Did it advertise the Society generally up to the time it was leased to the new company?

A. Yes, it was advertising the Society a great deal, and a great deal of it was unfortunate advertising.

2117 Q. How long had that unfortunate advertising existed?

A. Well, I said for the last five or six years, and I mean by that that the Society was not benefiting by the ownership and operation of the radio station. It had a lot of deleterious consequences and effects; it had so many op-

portunities of making people angry, and it was assuming a place of importance as an institution in the city here, and within the range of its hearing, so as to exclude from consideration a life insurance business, and it was not regarded as a part of the life insurance business, but more as an independent business, and we were thought of as operating a radio station instead of a fraternal beneficiary life insurance society.

2118 Q. Have you believed the station has been a splendid means of publicity for the Society?

[fol. 491] A. As I just finished stating, that I didn't think it had any the last five or six years.

2119 Q. Have you believed that during the last five or six years that it has been an adjunct to the publicity of the Society's activities?

A. No, I don't think it has. You cannot sell insurance over the radio, you cannot sell membership over the radio.

2120 Q. Would you say that it has been rendering a distinct public service for the past five or six years?

A. I think it has rendered a very decidedly big public service, but that don't write business for the Woodmen Of The World.

2121 Q. How long has this threat of taxation, taxing the Society because of the radio station, existed, approximately?

A. Well, I think at least for—from 1934 on. It began just as soon as the station got up to where it began to assume some prominence.

2122 Q. Did you ever report it to the Sovereign Camp?

A. Report?

2123 Q. The threat of taxing the Society because of its operation of the radio station.

A. I don't suppose that there has been a single Sovereign Camp since that time that I have not told them very definitely of the difficulties that confronted us in that respect, but taxation did not become such an important and virile interest before as it has recently.

2124 Q. Did you include that in your written report to the Society?

[fol. 492] A. No, I did not.

2125 Q. Why not?

A. Well, I preferred not to make any declarations about the Society or its earnings or what it was doing or what we ought to do with it, because if we attempted to get rid

of it, and I had put myself on record as finding it troublesome, I would have to take what I could get for it.

2126 Q. That would not reduce its value to the purchaser?

A. It would, Mr. Stewart, it would very muchly so, because he would be negotiating with you and that would be a chance of hammering down the price on you. That was my belief, and that is the one I acted upon. It may have been erroneous, but that is what I thought was the best way about it.

2127 Q. Then if I understand you correctly, you never placed in any of the written reports that you made to the Sovereign Camp any statement with reference to the threat made to tax the Society because it was operating a radio station?

A. No, I don't think I did. That is my recollection at the moment. It may have been in there, but I don't remember recently.

2128 Q. You believe that if the Society continued to own the station, but permitted it to be operated by a lessee, that that would eliminate the tax threat?

A. You are assuming the Society will continue to own the station.

2129 Q. Well, it is continuing to own it?

[fol. 493] A. It owns it now, yes.

2130 Q. Do you think that because the station is being operated by the lessee, although owned by the Society, that that will eliminate this tax threat?

A. Well, I think it cuts out most of it, but not entirely.

2131 Q. It is still receiving a profit from the operation of the station, is it?

A. It is receiving a leasehold monthly payment from the operator of the station.

2132 Q. And that is income to it from the station, isn't it?

A. That is income to it from the leasehold contract.

2133 Q. And that money is made by the operation of the station?

A. I think so.

2134 Q. Yes. So anyone that has in mind using the fact that the Society has been making money out of its station as a reason for a threat of taxing fraternal societies, is that reason excluded?

A. Not at all, no, if we continue to own the station, the reversionary interest in the station, I think they will have

some cause for complaint, but the fact that the station is leased and run entirely by a corporation and different people, I think it would have no effect whatever.

2135 Q. Well, you are going to own the reversionary interest for fifteen years now?

A. We own it now. I am not going to own it, if we can sell it, if I may make that answer.

[fol. 494] 2136 Q. How much does the Society want for the reversionary interest?

A. That matter has not been fixed yet in our minds, and has not been determined.

2137 Q. What is your own personal opinion?

A. Well, I prefer not to give that publicity at this time, unless the Court feels like I ought to do it. I think it is a matter that is a matter of dealing, and a little difficult to go and express yourself. I want to make the very best deal I can out of it. I might think now that $25,000 or $50,000 was right, and I might think in three months from now $100,000 was better, and maybe in six months I might not get that price, so I don't want to be put on record as to what I think about it.

2138 Q. You offered to give Mr. Swanson an option to purchase the reversionary interest for $50,000?

A. I never offered to give any option and sign any option to purchase the reversionary interest to nobody, no time, no place.

2139 Q. You know Mr. Swanson so stated?

A. I know what, Mr. Stewart?

2140 Q. You know he so stated that?

A. No, I don't know he stated it, and if he did, he is mistaken.

2141 Q. You would not have offered to give him an option to purchase that reversionary interest for $50,000?

A. I would not, and if you think just a moment—you are [fol. 495] speaking of this leasehold interest. Of course, the minute he got an option for the purchase of the reversionary interest he would become a purchaser of the station and not a lessee, and it would have cost them so doggoned much in income taxes that they couldn't even have begun to pay the monthly rental, so it is just one of the things that could not be.

2142 Q. Well, you suggested that that option be omitted from the written lease, and that Mr. Swanson take your verbal word for it?

A. I told him that there would not be any option in the lease. In the first place, I would not give an option, and in the second place, the taxing department would immediately construe that as a sale at the beginning instead of a lease.

2143 Q. Didn't you tell Mr. Swanson that you would give him your verbal assurance that he would have that option to purchase the reversionary interest for $50,000?

A. Not to him personally or anybody else, nor for $50,000, but I did say that I would be willing to dispose of the reversionary interest at a reasonable price and to some person satisfactory, but I did not tell it to him or to anybody else, or make any price on it.

2144 Q. Did you discuss any price with Mr. Swanson?

A. I don't think any price. I mentioned $50,000, as I might have twenty-five or one hundred thousand dollars, not as that was the price at which an option could be purchased for. I had not then given consideration to the amount that we could get for it, just as I now don't know [fol. 496] what I could get for it, or what would be a fair price. It will take quite a bit of time and thought, and I will begin to give it thought pretty fast when this case is over.

2145 Q. Have you made any effort yet to dispose of that reversionary interest?

A. Oh, no, no, of course not.

2146 Q. Do you have a copy of any bill offered in any legislature that proposes to tax fraternal societies because of their operation of radio stations?

A. I have not, and I don't suppose there is any one in existence. I am assuming that you mean contained in the bill.

2147 Q. Well, it mentions taxing fraternities because of their operating radio stations.

A. Yes. I don't think there is any such in the world.

2148 Q. Was the question of disposing of the radio station ever mentioned by you to the Sovereign Camps in any of your reports?

A. No. As I recall, for a time I had mentioned that—I mentioned at different times that we had been offered—that offers had been made for the station, and I think I mentioned the amounts there, but not going into detail or to any particular person who had made the offer, no.

2149 Q. When did you report to the Sovereign Camp of any offers that had been made?

A. Well, I would say probably in 1937 I would have made mention of the fact there that we had had offers for the [fol. 497] sale of the station.

2150 Q. Any other Sovereign Camps?

A. I don't know. Maybe in 1939. I don't know. It was a matter of common talk among the folks, and perhaps at the session where they were more or less informal, but I could not point to any particular time. I won't try to do that, and I won't say that my report to the Sovereign Camp itself made some reference to it, because I have not investigated the reports to see.

2151 Q. Well, was the question of disposing of the radio station ever submitted to the Sovereign Camp's action?

A. It was not.

2152 Q. Did you ever ask the Sovereign Camp for instructions as to whether you should dispose of the radio station?

A. I never.

2153 Q. The Sovereign Camp is the supreme governing body of the Society, is it?

A. It is.

2154 Q. And as I understand it, you have been considering the disposition of the radio station ever since 1937?

A. Well, that is the first mention I made of it, yes, I think, in our minutes.

2155 Q. And the Sovereign Camp was in session in 1937, was it?

A. Yes.

2156 Q. And in 1939?

A. It was.

[fol. 498] 2157 Q. And in 1941?

A. It was.

2158 Q. And normally would be in session this year?

A. Yes.

2159 Q. And in 1941 the Sovereign Camp amended its constitution—the constitution and laws of the Society to make the operation of the radio station one of the specific objects of the Society, didn't it?

A. I don't recall the time. I have forgotten what time. In 1935 or 1937 the charter was amended to provide for the operation of a radio station; might have been in 1933, but I think it was later, and it may have been that way. It seems to me that we did amend the first section there of the

constitution at some time in order to specifically provide for the operation of the radio station.

2160 Q. You were at both of those Sovereign Camps, I presume, 1937, 1939 and 1941?

A. What did you say?

2161 Q. You were present at each of those Sovereign Camps?

A. Yes.

2162 Q. And if the constitution and laws of the Society were amended in 1941 to make the radio station and its operation one of the objects of the Society, you did not report to the Sovereign Camp that you thought the station should be disposed of?

A. Well, not in any formal report, no, but we were expecting or fearful—I know at one time it was not in the [fol. 499] constitution and laws; I don't think it had to be in there as a legal proposition, but it did not appear in there. I remember suggesting at one session that we ought to include that as a part of the policy. I don't know what session that was.

2163 Q. Did the Board of Directors by formal resolution ever direct you to dispose of the radio station?

A. Direct me to?

2164 Q. Yes.

A. Well, we might have to get a definition of "direct" there. The only formal resolution we had about it was in 1942, but I had quite as much direction from the Sovereign Camp in 1941 and the early part of 1942 as I could possibly have by resolution, as far as that is concerned, because the directors said, "We want you to do the best you can with this and see what you can do with it", and so forth. The surprising part is that they passed such a resolution in 1942. I would not have done it if they had not insisted upon that, making an investigation about it and giving me the advantages of their opinions on the negotiations, and the extent that they had gone, and so forth.

2165 Q. You are referring to the Board of Directors?

A. Yes. That is what you asked about.

2166 Q. Yes. Well, as a matter of fact, there isn't any record showing that the Board of Directors told you to dispose of the radio station, is there, Mr. Bradshaw?

A. May I repeat again that the only resolution was the [fol. 500] one passed in August, 1942, as far as a written resolution is concerned.

2167 Q. And the Board of Directors left it to your judgment to determine whether the station should be disposed of, and also the terms?

A. I believe that is correct. Terms were suggested, ideas were given then about what I thought could be done, the progress I had made, the people I had contacted, and things I had done in conformity with their expressed desires, not expressed in a formal resolution, because we don't always have formal resolutions for the things that we want, that we want done, and we have just as few resolutions as possible.

2168 Q. Why?

A. Well, they are very binding in matters of that kind within certain limits, and we operate, and they do, with the idea of giving me, as the president, as much latitude as possible with reference to every phase of the business.

2169 Q. You don't like to be bound by the definite directions of the Board of Directors?

A. I didn't say that. Quite possible, the contrary; the Board of Directors don't want to bind me.

2170 Q. The Board of Directors don't want to bind you?

A. Yes, sir.

2171 Q. They want to leave it to your discretion to decide?

A. Yes, sir.

2172 Q. In your report to the directors at the meeting in [fol. 501] August, 1942, you said you believe the proposed lessee should pay in for a lease at least $150,000 in cash, and should also have a capital of at least $100,000, which would make a total of $250,000. What was your reason for wanting that, Mr. Bradshaw?

A. Well, I felt then, as I do now, as every sensible person would feel, the more capital you will require the lessee to have, the more certain you are to get your money.

2173 Q. And at that time you felt that should be at least $250,000?

A. I felt like it would be very much safer if we could get it.

2174 Q. That is quite true. You would have been delighted with a million dollars?

A. Yes.

2175 Q. You did not say one million; you felt that $250,000 was the minimum at that time, didn't you?

A. Well, I don't know that I felt it was the minimum, but I felt like we ought to have it if we could get it. That is as true an answer as I can make.

2176 Q. And that was in order to protect the Society in the collection of rents?

A. Yes. Of course, according to the allegations here, and according to everything else, it was going to make so much money that I wouldn't need it, but I know that it was wise to have as much capital as we could get the lessee to put in.

2177 Q. But you finally, in your efforts to dispose of the station, reduced that amount from $250,000 down to $100,000?

[fol. 502] A. Yes, I did.

2178 Q. And of that $100,000, why, you had the Society transfer to the new Company $25,000 of that capital?

A. That was in contemplation at that time because we could not tell just when we could get the thing set up. Of course, we were figuring on this back as early as May, but could not get it done in May, June, July and August and September, and until October before we could get together and get the things worked out. In the meantime we had been collecting all the money at the station, and some argument was made on the part of Mr. Gillin, he said that we had already collected enough of it, we ought to forget that, a good part of it, but I insisted that we never take less than $100,000 cash capital for the corporation.

2179 Q. That is, Gillin thought that the Society ought to give part of the earnings of the station to the new company?

A. No. He thought the amount required to be put up by the station ought to be reduced. It was not reduced.

2180 Q. What was your reason for not keeping the station until you could get the $250,000 that you originally thought should be in the capital of the lessee?

A. Well, I don't know that we could ever have gotten the $250,000. It looks easy now, when you look back at the thing, but we were striving there for months to get it and working hard at it. In the meantime, activities in the National Congress with reference to taxation, and in the State [fol. 503] of Nebraska, commenced initiating these bills, and started all this trouble here, that maybe you think you better get out as quick as you can, and that is what I thought.

2181 Q. In other words you were endeavoring to go ahead and dispose of the station for the best price you could get from Gillin and his associates?

A. Yes, if that price was within my limits, my determined limits about the matter, which was $100,000.

2182 Q. That is, your statement to the Board of Directors didn't impress them, did it?

A. No. They told me to handle it and lease it.

2183 Q. And did you believe it for the best interests of the Society to make this lease of the station even though it reduced the income of the Society from the station from $278,000, which it received in 1942, down to an average of $74,000 a year under the lease?

A. I did.

2184 Q. That is, assuming that the station earns that much this year, or would earn that much this year, that would be a loss of income to the Society of how much?

A. Just a minute. You know how to subtract $74,000 from $278,000; that is all it is.

2185 Q. And it also increases the expenses of the Society about $35,000 a year, doesn't it?

A. No, it does not increase the expenses of the Society, because I now make the salary that was charged against the [fol. 504] radio station; that is, a portion of the salary charged against the radio station.

2186 Q. Yes.

A. Now, the Society pays those charges, and it is charged against that, just like the traveling expenses of the committee charged against the investment of the finance committee, or the traveling expenses, and buying books and so forth might be charged against the legal department, and other things of that kind.

2187 Q. Oh, $15,000 of your salary has been charged against the radio station, is that it?

A. For some time, yes.

2188 Q. And that was for your services in connection with the station?

A. Well, I think that was the same reason.

2189 Q. Do you expect to continue to receive that $15,000?

A. I certainly do.

2190 Q. Do you expect to participate in the management of the radio station?

A. I do not. I have no interest in the radio station.

2191 Q. You will continue to receive that same $15,000?

A. My salary, I told you before, was fixed by the Sovereign Camp for $50,000 a year; that salary I will draw as long as I am president, and it doesn't make any difference whether I have the radio station or law department or claim department or anything else, I will draw the salary.

2192 Q. Is that true of the other salaries?

[fol. 505] A. It certainly is.

2193 Q. They have been receiving the salaries from the station?

A. Yes; that salary was paid, and we required a contribution from the station for that salary.

2194 Q. And those salaries were charged against the radio station of the officers of the Society, which amounted to $35,000 a year?

A. That is correct.

2195 Q. So the Society will now have to pay $35,000 to your officers, which it cannot take out of the earnings of the radio station?

A. Absolutely; the radio station was not considered at all when our salaries were fixed, it had nothing in the world to do with it.

2196 Q. But it will have the effect then of reducing the net income of the Society by $35,000?

A. Well, that would be obvious.

2197 Q. Did I understand you to say that the radio station had not earned anything up to the time you became the president?

A. I think I made that statement.

2198 Q. And it was started in what year?

A. Twenty-three years ago.

2199 Mr. Wells: Twenty-three years ago.

The Witness: Twenty-three years ago.

2200 Q. And it lost money every year up to the time that you went into the presidency?

A. I think so.

2201 Q. Why did you continue the operation of the sta-

[fol. 506] tion if it had lost money during all those years?

A. May I repeat what I said this morning about it, that we had the radio on our hands; of course, it was not a matter that you could sell for anything. I thought it had possibilities, it seemed to me that there was an opportunity to do a good big business with the radio. John Gillin was with us, and John thought so. Mr. Orson Stiles, who had been with this station during that period, he thought so. Colonel Patterson, who had worked from the beginning, when the station was started, up until that time, he thought it was possible, but he was not very favorable to it, he

thought it might be an experiment and would have to put in too much money. I gave consideration to it in every way, and I thought some money could be made out of it if we could build the station. They had the property. I didn't want Mr. Stiles to have anything to do with it. I thought a new development and new setup would be the better thing. And Colonel Patterson was busy with other things, and I thought if we could get a different organization and different plan we might be able to recoup our money, get back what we had lost. I had asked Mr. Fraser to buy the station, and begged him to do it, and it required management to continue to make the station go, in my judgment, and I believed that I would spend some money on it. And, as I said, we spent $169,000 in equipment in fixing the station out. After we got this glamour and so forth fixed, we had forty thousand people in one week go [fol. 507] through that radio station. And I happened to be right, we made more than a million dollars out of the station.

2202 Q. Well, isn't it a fact that it made money back there in 1929, 1930, 1931 and 1932, before you became president?

A. I don't think so.

2203 Q. Will you have one of your men check those figures, Mr. Bradshaw?

A. You can have anybody check it that you want to. You know all of my men here. I am telling you what I think about that. You can ask any question from any of our officers—the bookkeeper, and get whatever you need, or whatever they contain.

2204 Mr. Crossman: Is there anybody in the court room, Mr. Bradshaw, that can get it for Mr. Stewart?

The Witness: Well, Mr. Pakes over there, and Mr. Peterson, the bookkeeper, and another one over there who knows all about it, Colonel Patterson.

2205 Mr. Crossman: Mr. Pakes is present. You ask him for what you want.

2206 Q. As I understand it, Mr. Newberry and Mr. Patterson, you say, both opposed the continued operation of the radio station by the Society?

A. Yes.

2207 Q. From about what time?

A. Well, from the beginning Colonel Patterson was more or less skeptical about it all the time, saying that we were [fol. 508] in the insurance business, and if anything would come up I must see about this or go down there to inquire of some other man or some other lawyer; he would say continually, "We are in the insurance business."

2208 Q. Was there any record—(interrupted).

A. Wait a minute. I want to answer your question, because Mr. Newberry has not been with us all the time; he came to us—he is a recent man here; I think he came here in about 1936, wasn't it? 1936, yes, I guess, and then he became an official secretary somewhere along about that time, 1936, 1937.

2209 Q. Is there any record of Mr. Newberry, or Mr. Patterson, as officers or directors, opposing the operation of the radio station by the Society?

A. There is not.

2210 Q. The minutes of the Board of Directors meetings have always shown that they were not opposing such operation?

A. The minutes of the meetings don't show anything about it.

2211 Q. Well, the minutes of the meetings show always unanimous action on the part of the Board when any action was taken regarding the radio station?

A. Well, yes/ That was introduced in evidence here, and speaks for itself. Of course, now you are asking for other records.

2212 Q. Well, as I understand it, there isn't any other record?

A. That is what I said, there are no other records.

2213 Q. As president and director you voted along with [fol. 509] the other directors?

A. Yes; I voted every time they did.

2214 Q. And the records that relate to the radio station show that all of the directors voted the same as you did at every action?

A. Yes. Is it your idea that someone ought to vote against it?

2215 Q. I didn't understand.

A. Is it your idea that some of the minutes ought to show that someone voted against it?

2216 Q. No. I just was inquiring as to the facts. As I understand it, you suggested to Harvey Milliken that he invest some money in the new company?

A. I was walking up the street—yes, I asked him.

2217 Q. How long have you known Harvey Milliken, approximately?

A. Well, I believe about twelve, thirteen years, maybe.

2218 Q. What is the nature and has been the nature of your acquaintance with him?

A. Well, it has been business for that length of time, because he is the president and general manager now, was formerly manager, of the Omaha Printing Company, and then I have had social relationships. I met him at the club, I have been in his house, he has been at my house, and we have been friends.

2219 Q. Are you what might be termed close friends?

A. Warm, distinct friends.

2220 Q. Well, would you consider yourself as close friends?

A. I would, yes.

[fol. 510] 2221 Q. I believe you also suggested to Mr. M. M. Meyers that he become interested in the new company?

A. Yes, I did.

2222 Q. And I believe you said that your friendship with M. M. Meyers dated back to the time he was in the university?

A. Yes.

2223 Q. About how long ago has that been?

A. Oh, let me see. That has been—oh, I think that would go back to about 1920, 1921, 1922, 1923, along in there.

2224 Q. Did you also suggest to Francis Matthews that he become interested in the new company?

A. I don't believe I ever mentioned it to Mr. Matthews. If I did, it was after Mr. Gillin spoke to me about him, and Mr. Gillin and I discussed him two or three times as a possible person that could be obtained.

2225 Q. You and Mr. Matthews have been close friends for a number of years, have you not?

A. Well, we have been friends, yes. Not so close as I have with other friends, but I regard Mr. Matthews as my friend, and I am his.

2226 Q. I believe you stated that you were doing your bit to help Gillin in getting his new company organized.

A. I was helping him to get the company organized so that we could dispose of the radio station. That is what I was doing.

2227 Q. And in that connection, in your conversations with Mr. Dale Clark about a loan to Gillin, didn't you tell [fol. 511] Mr. Clark that you thought the stock in the new company would prove a good investment, and that the Gillin note would be ultimately paid?

A. I will repeat what I stated this morning, as near as I can. It is the truth: That he asked me about the matter. Now, Mr. Clark was more or less familiar, he knew that negotiations were going on, had been going on, and he heard that Gillin had applied for a loan, and he wanted to know whether or not they would be safe in making the loan. And I asked him about what security, and he said, "How about the radio business?" And I said, "If you are putting a loan procured upon the value of the stock in the radio, I would say to you that in my judgment it was not bankable stock, or stock that you could make a loan on. I think it will be paid, I think they will make money, and I don't know that they will; it is a risk, and you would have to determine that matter yourself." And what he did about it, I don't know except as was testified by John Gillin yesterday. I never saw the note or anything about it.

2228 Q. Are you a member of Ak-Sar-Ben?

A. Yes, sir. I believe they call it—pardon me—Governors of Ak-Sar-Ben.

2229 Q. Member of the governing body?

A. It is no big job.

2230 Q. And that is the organization that Isaacson works for?

A. Jake Isaacson, yes.

2231 Q. Did I understand that you also suggested to him [fol. 512] that he might invest in the new company?

A. I went to see him on an occasion, not for this purpose, but an entirely different one, and I said to him, "Jake, I am trying to get rid of the radio station. I don't know whether I will be able to do it or not. I have been trying to get somebody to but I am inclined to get rid of the station, and it might be that you can get in. John Gillin is trying to get up a group, and it might be that you can get in. If so, I would be glad to have you do it, because I think you will make some money out of it."

2232 Q. As I understand it, you helped Gillin to try to get his friends interested in either buying or leasing the station, because he was in the radio business and active in it?

A. Yes, sir.

2233 Q. You didn't, yourself, make any effort except through Gillin?

A. Oh, yes; I contacted a good many people myself. I just testified here I contacted Guy Myers, I contacted him and also Jake Isaacson here.

2234 Q. Well, but that was as members of Gillin's group?

A. Well, I was—I would talk to anybody, and tried to get him to get the organization going so that he could get the organization built up. That is what I was trying to do.

2235 Q. That was the extent of your efforts?

A. Yes; everywhere I could get ahold of anybody that would take any interest in it, or express an interest, or be inclined to do it.

[fol. 513] 2236 Q. I believe that you said—you have not testified to it here, but I believe in your deposition—that the radio station took not to exceed ten per cent of your time?

A. I expect I testified to that. I have been thinking about it since I have been in the court room, and I have been considering that, and that is the answer I made at the time that you were questioning me. Well, I think I made a mistake. I think it must have taken quite a bit more time than that. For example, we are here in the trial of this case for nearly a week, is one-tenth of a year. You don't just think of things that way, one-tenth of a year will be gone Sunday, when the week is over, and you just don't measure the time that way when you are going along. I spent, I think, quite a bit more the last year, much more.

2237 Q. You don't think you made any other mistake in your testimony here today or yesterday that you might want to correct?

Mr. Crossman: Just a minute.

A. Well——(interrupted)

Mr. Crossman: If you want to answer, I withdraw the objection, but it is an insinuating question.

A. (Continuing) Sure, I will answer that. I may have done so.

Mr. Crossman: It is an insinuating question, but I withdraw the objection.

A. (Continuing) I haven't read the deposition you took, or any other deposition here since they have been taken. [fol. 514] I don't know what is in them, but there may be mistakes in it, and if so, when they come up, and you ask me about it, I will frankly tell you yes or no, or that there is a mistake or there isn't. It isn't anything that I am trying to dodge or care about it. I didn't read the deposition. What is the difference if I said it, and I might not have thought it over when I said it in the deposition.

2238 Q. About how many hours' time out of the week do you think you devoted to the radio station?

A. I cannot estimate it very well. These are the things that happen, and upon which one must make his conclusions; probably only takes ten minutes; sometimes a long distance from John Gillin in Washington or somewhere, and I spend quite a little time with that, and I've got to go down to his office to get the information, or send someone to get it. I am still at my desk working and taking care of some other matters. Bill Ruess comes in with a matter, and he wants to talk it over with somebody, and he wants me to read a bunch of rules to find out what the F. C. C. is trying to do, and there is more time spent. Of course, that is not every day, but it may be two or three times in one week, and then Gillin and Ruess, both, are coming in, but they will be coming in when I have other important matters, and I will tell him the law, and I will see Johnny Gillin as I go down in the elevator and he catches me as I go out, then I talk with him about it, or maybe it is somebody else, or maybe it is one of the directors; it is not a [fol. 515] matter that you can intelligently or truthfully fix a definite amount of time on.

2239 Q. Well, isn't it a fact that Gillin manages the station, and that it is only something extraordinary that comes up that is brought to your attention?

A. Well, there is something extraordinary coming up so often, that is what is the matter; those are the things that are coming up all the time. He wouldn't come to see me on the ordinary things, or the ordinary activities, or ordinary programs. And he would come and talk to me and say, "What do you think about so and so?" And I could not estimate the time. Besides, those things are

coming up constantly, and I find him at home, he calls me up out at my home, he comes to see me, comes at nighttime, comes as late as 10:00 to see me. I wouldn't say that it took more than ten per cent of my physical waiting time, but I don't know. It may be more than that. I think the last year it took quite a bit more than that.

2240 Q. You have just returned from Florida, have you not?

A. Yes.

2241 Q. How long have you been down there?

A. Two months.

2242 Q. Were you down there last winter, too?

A. Yes.

2243 Q. How long?

A. Two months one time, and returned two months at [fol. 516] another, but if the inference is that I cannot give the radio station any time, then I will say to you that I have talked for thirty minutes and forty minutes at a time with John Gillin on long distance both from New York and from Washington and from Omaha, and I just constantly held the thing in my mind, and letters that had been sent to me asking me for construction of rules and certain phases of the business. You know, when I am in Florida I have my secretary and stenographer and I carry on work the same as I do here.

2244 Q. Now, these negotiations with men representing the World-Herald, do I understand you to say that they said that the World-Herald would be in the market for the station?

A. I think they said that they were in the market; not would be, but were.

2245 Q. And could pay for it and would like to buy it?

A. Oh, they said, "You know we have plenty of cash, we can pay any amount."

2246 Q. You told them it would be at least $800,000 cash on the barrelhead, words to that effect?

A. I don't think we mentioned the amount, but maybe we did, but if we did, that is what I told them, but I don't recall that we discussed that. I told them that I didn't think they could buy it under the present laws, and I said it was the understanding that the World-Herald was making a lot of money, and if it was, and making a lot more in this business, why, it would be an expensive thing to pay an income tax.

[fol. 517] 2247 Q. But you told them that you were not in a position to consider an offer from them until you found out whether this other group of Gillin's were going to go ahead with the lease of the station?

A. Well, that is in substance what I said; probably in a little different language.

2248 Q. And you thought it would be better, I assume, for the interests of the Society that it make the lease to Gillin and his associates, this lease that was made, rather than to sell the station for $800,000 or more to some purchaser?

A. Are you trying to say that they offered $800,000 for the station?

2249 Q. No, I didn't say that in my question.

A. I didn't have anybody who would offer to pay me $800,000. I never offered it for that amount, but I think if anybody had gotten around and offered that amount that we would never have let him get out of the house; we would have gotten his money.

2250 Q. You wouldn't negotiate with the World-Herald until Gillin's group decided whether they were going to make the lease or not?

A. I told him that I had proposals out to the Gillin group, if you please, that I had made certain declarations to them, and if they accepted them—they were considering them, and until that was determined I could not make any negotiations with them. I wouldn't make them.

2251 Q. And that occurred, I believe you said, more than [fol. 518] a week before the lease was signed up?

A. Oh, yes, I think it was, I think it was more than a week.

2252 Q. How long before would you say?

A. Well, I haven't got the date in my mind, and I wouldn't know. It just seems to me to be a little longer than that, and it might not have been more than a week. It seems to me it was more nearly a month, but I don't know.

2253 Q. Was any notice given to the members of the Society that the officers were considering disposing of the radio station?

A. We didn't give notice to the members because the handling of the Society's business is in formal reports to the head Camps and to the Sovereign Camp.

2254 Q. And no such formal report was made with reference to the radio station?

A. No such report was made.

2255 Q. Nor was it in any of the magazines?

A. Nor was it in any magazine, no.

2256 Q. Why not, Mr. Bradshaw?

A. Well, we don't transact business that way. That is why they elect the Board of Directors and Officers, to transact the business and not go around to see what you could get for yourself from one of the members.

2257 Q. And is that also why it was not contained in the reports to the Sovereign Camp?

A. Also why, what was not contained in the report?

2258 Q. That the officers were considering disposing of [fol. 519] the radio station.

A. Well, I could not say that that was the reason at all, or was not the reason, for that matter, because we had no offer and had none at the meeting in 1937—oh, yes, we had in 1937; I believe I testified that I had told the Sovereign Camp about these offers we had.

2259 Q. There is no record of that, is there, Mr. Bradshaw?

A. Oh, I think not, no, sir, there is no record of that, but, you know, in the meetings of the Sovereign Camp, I presume that the amount of information that is placed there, and the amount of record is made is only one-tenth of the amount of record as compared to the information.

2260 Q. Well, this is the only radio station that the Society has ever owned, isn't it?

A. Yes.

2261 Q. And they had up to the time they leased it, they had owned it for more than twenty years?

A. Yes.

2262 Q. Do you think the disposition of that radio station was of sufficient interest, if it had been discussed, to have been included in your report?

A. No, I don't think so.

2263 Q. In what manner were you originally selected as president of the Society; by whom, I mean?

A. By the Sovereign Camp. I was selected here on the 30th of November, 1932 at a session specially called, ses- [fol. 520] sion of the Sovereign Camp, and elected by ballot.

2264 Q. Who has authority to call a special session or any other session of the Sovereign Camp?

A. Well, I presume—I couldn't answer that question. I don't know. We have had a special session or two of the Sovereign Camp called by the Board of Directors, but in this particular instance the law specifically provides in this case that upon the death—and that is the law under which we operate—upon the death of the president, the vice-president shall take charge and call a meeting of the Sovereign Camp within thirty days for the election of his successor, and that is what was done.

2265 Q. Do you, as president of the Society, have the power to call a meeting of the Sovereign Camp?

A. Really I wouldn't want to say. I don't know whether I have or not, but I wouldn't call it without all the directors voting for it, so I don't know.

2266 Q. Does the Board of Directors have that power?

A. Well, I think so; yes, I believe they have.

2267 Q. Prior to your election as president, what was your title?

A. General attorney.

2268 Q. And as such, what, in a general way, were your duties?

A. Well, I looked after the legal interest—not the legal interests—I looked after the litigation and claims and death claims and losses, and also some other matters, departmental matters appearing before the departments of [fol. 521] the various states and Federal Government, and passing on all the bonds that were purchased by the Society, their legality, to see whether they had been issued in accordance with the law of the state, with the entity which issued the bonds, and advising the officers, and run a lot of errands for Mr. Fraser, which I gladly did. I don't mean any criticism or complaint about that.

2269 Q. Was it your duty to advise the officers of the Society on all legal matters pertaining to the bonds?

A. Well, I did.

2270 Q. Were you also a director?

A. No.

2271 Q. As general attorney you did not also have the office of director?

A. No. I resigned when I became general attorney, because I did not believe that the general attorney had any

business to be on the Board of Directors, I did not think he ought to be passing laws and resolutions and so forth and then sit as general attorney to determine whether they were legal and binding, and I resigned.

2272 Q. Were you general attorney for the Society when its officers used two million dollars of the Society's assets to organize a stock insurance company known as the Globe Life Insurance Company?

A. Yes, I was.

Mr. Wells: Just a minute.

[fol. 522] Mr. Crossman: That is objected to as incompetent for the reason that it has no bearing upon any material issue in this case, and comes with very poor grace from Mr. Stewart also, who was one of the attorneys, I think, in that case.

Mr. Stewart: Well, I don't know about the matter of grace, or whether that is involved or not, but it becomes material.

The Court: It is in the record. Let it stay there.

2273 Q. Did you participate in the formulation and execution of that plan, Mr. Bradshaw?

A. I did.

2274 Q. And both the District Court and the Supreme Court held that that plan was unlawful, and that the officers had acted fraudulently in attempting to divert the Society's business over to the stock company that would ultimately be controlled by the officers of the Society and their friends?

Mr. Crossman: That is objected to as incompetent and wholly immaterial, and having no bearing on any issue in this case.

The Court: I think that is not material.

Mr. Stewart: Just a minute before your Honor rules definitely. Mr. Bradshaw, in his direct examination, made statements that he had always performed his duties for the benefit of the Society, and he never did anything or partici-

[fol. 523] pated in any transaction that was not to the best interests of the Society. Now, here is a case in which the Court held that this case of the officers in organizing the Globe Life Company was not only unlawful, but was fraudulent, and Mr. Bradshaw has stated that he participated in the formulation of that plan, and I say that we have a right to inquire into that transaction and as to his partic-

pation in it. I have not tried to go into detail, but I think we are entitled to show that.

The Court: You just want the record that he participated in it? Ask him another question. It is a conclusion.

Mr. Stewart: Well, I suppose the report of the case would probably be the best evidence.

Mr. Crossman: If admissible.

2275 Q. The report made by Mr. Paul, the treasurer, referred to the need of taxation for tax exempt corporations?

A. You are referring to—is that the gentleman from Mr. Morganthau's office?

2276 Q. Yes.

A. I don't know. I have not seen the report. The only report that I ever saw was that the newspaper said that the Secretary of the Treasury was trying to get taxes fixed against fraternal benefit societies where they operated a business other than that particular business, which, by the [fol. 524] way, would not be unfair.

2277 Q. You know that that report of Mr. Paul was not included in the 1942 tax bill?

A. I don't know anything about that, except I know the law remained as it was before, at the conclusion of the session of Congress in 1942 on that question.

2278 Q. You spoke about litigation during the past years over the station's right to broadcast, and controversies with various stations, including one in Mexico. Do you recall about when that litigation was?

A. I had no litigation in Mexico. I was not speaking of litigation in that connection. I did not mean to, if I left you under that impression.

2279 Q. I may have misunderstood you. There was one with reference to the Georgia station. When was that litigation; was that in recent years?

A. I guess within the last two years.

2280 Q. You said that your Society retained a firm of attorneys in Washington by the year to protect your radio's interests?

A. And paid them extra expenses.

2281 Q. And that they handled those cases for the Society?

A. Oh, yes. They are specialists in the laws and the rules and regulations of the Federal Communications Com-

mission and they practice before that body. I don't know anything about that, so I have to get somebody who does.

2282 Q. That litigation that the Society had also included or involved your right to the entire time and wave length, [fol. 525] didn't it?

A. No. For many years, you see, we bought the station years ago, before Lincoln, the university down there, the Methodist University had a station, and they were granted it after we had our station running for years, and the Federal Government came in and granted that school down there a part of our kilocycle time, and I have forgotten how many hours, and we—may I use a slang word—we messed around with that, I don't know how long, tried to get rid of that and finally had to buy the station in order to protect our kilocycle.

2283 Q. Well, the facts are, Mr. Bradshaw, aren't they, that you tried to get that time away from the Nebraska Wesleyan University and were defeated in that litigation, and later acquired the station?

A. Yes, I think we did. I don't know whether it ever went to litigation, but we—you might call it litigation, because we were appearing before whatever commission that handled it at that time, trying to get the Government to grant them some other kilocycle and let us have our own, since they had taken ours away from us and given it to them.

2284 Q. Don't you recall that the commission that had it in charge then refused to give you that time?

A. Sure, I recall it. That is one of the dangers of the radio business.

2285 Q. And then it was appealed by the Society to the Court of Appeals of the District of Columbia, and they [fol. 526] also decided against the university?

A. Well, if you say so, yes. I don't recall it.

2286 Q. I represented the Wesleyan; I think I am right about it.

A. Well, I will say yes then.

2287 Q. What does the Society expect to do with the station when its present lease terminates?

A. Fifteen years hence?

2288 Q. Well, whenever it does terminate.

A. I don't pretend to be here then. I certainly am not going to be actively engaged for the Woodmen of the World at that time.

2289 Q. Well, of course, the lease might terminate before fifteen years.

A. Well, then when it does, why, conditions will arise, and I will, if I am in the picture, I will act as I think ought to be done at that particular time.

2290 Q. You have in mind at the present time no explanation as to what will be done with the station when the lease terminates?

A. No. I could not project my mind that far ahead in times as critical as these on as tricky a thing as a radio station.

2291 Q. You said you were not planning on being here. Do you have in mind that you are going to retire?

A. Well, I would hope I would retire by that time. I would be ninety then, so I think it would be about time to retire.

2292 Q. You didn't intend to state that you were going to retire at the present time?

[fol. 527] A. No. I am speaking about fifteen years hence.

2293 Q. You stated that the public had gotten to the point of thinking that the Society was in the radio business instead of the insurance business.

A. Yes.

2294 Q. How long has that existed?

A. Well, it has been growing for the last—I would say ever since we began to make a real success out of the radio station.

2295 Q. And that would be since, then, about 1936?

A. Well, we got a little—we were getting along a little better before that time, but—well, if you insist upon a date, I will fix it as 1936.

2296 Q. How many employees does the Society have, approximately?

A. With the radio station and counting the women who take care of the floors and mail rooms and everything of that kind, mailing our papers, we had about 420, I think, the last survey I made of it.

2297 Q. You stated the annual income of the Society was about sixteen million dollars.

A. Yes.

2298 Q. Approximately how much of that was premium income?

A. Between nine and ten million.

2299 Q. You stated that it was difficult to get a return of more than three per cent on the Societies investments at the present time. Can you state approximately what return [fol. 528] it is receiving from its building?

A. You mean the office building there?

2300 Q. Yes.

A. I believe that it is getting right at seven per cent—between 6.90, 7 per cent, somewhere in there, for the last year. Of course, it ran down a little during the war, on account of war. Now, that is taking into consideration that we charge against ourselves, the same per square foot space against the Society that we do every other tenant, and so that we appear as a lessee of space in there from the building. The building is treated as an entity itself, and we are leasing space from it. That is the set-up in our bookkeeping, just like the radio.

2301 Q. That applies to the offices of the Society as well as the radio station?

A. Oh, yes, just exactly the same way. We try to make each carry its own weight.

2302 Q. Is the building well occupied?

A. It is.

2303 Q. At the present time?

A. It has been from—I think it is about ninety-one or two per cent occupied now, and prior to that time, you see, up until the first of last year, or before Pearl Harbor, it ran about between ninety-five and ninety-seven per cent occupied.

2304 Q. You stated that one of the considerations for the lease of the radio station was the rent of the space in the building.

[fol. 529] A. Yes.

2305 Q. But you wouldn't let the Federal Communications Commission know that. Why was that?

A. It was not presented to the Federal Communications Commission as a part of the explanation of the lease. The Federal Communications Commission knew the lease, they saw it there, it had to be attached—everything that was written or transpired or taken place between them would have to be attached to the application, so that was attached to the application, but it was not as a part of the consideration for making the lease. That is what I meant to say, or the information I tried to convey.

2306 Q. You have given in your opinion on direct examination and cross examination all of the reasons that you have had for the leasing of the station?

A. I would not say that I have given all of them. I have given those that occurred to me since I have been sitting on the witness stand. I haven't gone down and counted up all the different reasons and itemized them to see whether I checked them all over or not; I have not done that.

2307 Q. Did you give any of those reasons to the Federal Communications Commission in your application for consent to transfer the lease of the station to the new company?

A. Yes, I gave some of them to them.

2308 Q. Which ones did you give?

A. Well, the principal one was the tax situation.

[fol. 530] 2309 Q. Do you have a copy of the application which the Society made to the Federal Communications Commission?

A. No, I have not.

2310 Q. Does anyone connected with the Society?

A. I don't know. I suppose we do. I don't know whether they have or not. I didn't keep any. It is a voluminous thing. We didn't keep any copy of it. It has to be made on their forms and filed with them, and on the forms that they made.

2311 Q. Did you sign them?

A. Yes.

2312 Q. Is there any other reason besides the tax situation mentioned in that application?

A. I was not revealing all of the reasons. Maybe a fairly prudent man would not do so. For instance, I did not want to tell the Communications Commission that we were not interested in running the radio station, and we were trying to get out of the business. I did not want to pass that information on to the Communications Commission, because somebody else might come in and apply for our frequency, and if they did, we would have then a terrible hard fight to keep them from getting our frequency, even here in this district. If I had been there telling them that we were tired of running the station and wanted to get rid of it, they wouldn't think about the money that was coming to us; they would say, "We will give you this other's group."

2313 Q. Did you give any other reason other than the tax [fol. 531] reason in that application for assigning the lease?

A. We didn't state any reason in the application, I don't think, at all. I don't think anything was stated in there. If there was, why, the application would be the best evidence. I don't remember about that. I thought you meant discuss the matter before the Federal Communications Commission or some member of it.

2314 Q. Well, then in the application itself there was no reason stated for the assignment?

A. I don't recall that there was any.

2315 Q. Didn't the application call for the reasons for the assignment?

A. Well, I don't remember whether it did or not. I don't recall it.

2316 Mr. Stewart: Do you have a copy of that application, Mr. Massey?

2317 Mr. Massey: I don't believe I have ever seen it.

2318 Mr. Crossman: I looked for one. I don't find any.

2319 Mr. Stewart: Do you have one, Mr. Wells?

2320 Mr. Wells: No, sir; there isn't one in our office. The only one I saw was the original filed in the Federal Communications Commission office.

The Witness: We had to file—was it five copies or three copies?

2321 Mr. Wells: Three copies.

The Witness: Three copies. It was made there in Washington, and filed. It was not prepared out here and taken [fol. 532] out there.

2322 Q. To your knowledge, does the Society have a copy of it?

A. Oh, no, I don't think we have a copy. If the attorney hasn't got one, I am sure we have none.

Mr. Stewart: And don't have any in court.

Mr. Wells: I do not, I think you have.

2323 Q. Mr. Bradshaw, I have in my hand what appears to be a copy of the application made by the Society for the transfer of its license to the new station—(interrupted).

Mr. Crossman: I object to any reference to it.

Mr. Stewart: Just a minute, until I finish.

2324 Q. (Continuing) On Page 14——(interrupted)

Mr. Crossman: Just a minute.

Mr. Stewart: I want to finish my question.

2325 Q. (Continuing) On Page 14, according to the copy, it appears to have been signed by you——(interrupted)

Mr. Crossman: Just a minute.

Mr. Stewart: Let me finish and then you can make all your objections. He is your witness.

Mr. Crossman: He is your witness now, and you are bound by what he says.

2326 Q. (Continuing) On Page 12 of that application I call your attention to this statement: "Reasons for the assignment."

Mr. Crossman: I am going to object to that for this reason: I object to the inquiry and the reading into the record of a written document of any kind or character upon [fol. 533] cross examination until the written document has been identified and admitted in evidence, and there is no device in the world by which an attorney can pick up a written document and start to read from the written document, read it into the record, before the document is identified or admitted in evidence, and he is doing indirectly what he cannot do directly, and I would object to any inquiry or any reading until the document is identified and admitted in evidence.

2327 Mr. Stewart: How does he know what by question is going to be?

Mr. Crossman: I objected because you started to read out of a document that is not in evidence, and I apologize for its interruption. I warned you I would have to if you persisted in doing what you are doing, and you compelled me to interrupt because you are putting into the record here a thing you have no right to do, as you well know.

2328 Mr. Stewart: May I finish my question?

Mr. Crossman: I object to a completion of the question.

The Court: I don't think you can refer to the document. You can ask him if he knew what was in there, and if this was what was in that paper.

2329 Mr. Stewart: That is exactly what I proposed to do. I asked him whether the statement was in the application [fol. 534] which he signed, as follows. Now, he may not know or he may say it was.

2330 Mr. Crossman: You have no right to read out of the document to him until the document is admitted and identified. May I make this suggestion before Mr. Stewart proceeds in any way with reference to this document? I

ask that he be required to have it identified at least as an exhibit in the case.

2331 The Court: Well, he can inquire from the purported document and ask him——(Interrupted.)

2332 Mr. Crossman: If it is his signature.

2333 The Court: He can ask him is it in the application.

2334 Mr. Stewart: Which he signed.

2335 The Court: Don't refer to that application.

2336 Mr. Crossman: There is no proof that he signed it.

2337 Mr. Stewart: There is no proof that he signed this document, of course not, there is not yet. He says he signed one, and I am asking if it was in the one he signed.

2338 Mr. Crossman: The objection I make, Mr. Stewart, is that you have no right to read into this record out of a document that is neither identified nor offered in evidence, and doesn't even show that he ever signed this particular document.

2339 The Court: I think you can ask him if the document which he signed contained that, but don't refer to [fol. 535] this document.

2340 Mr. Stewart: I will start a new question.

2341 Mr. Crossman: Let the record be expunged about that.

The Court: All right, strike that out, but it will remain, it will be in there, everything you say.

2342 Q. Mr. Bradshaw, in the application which you signed on behalf of the Society for a transfer of the license to Radio Station WOW to the new company, was there a statement in that application as follows——(Interrupted.)

Mr. Crossman: That is objected to as incompetent, it is not the best evidence.

2343 The Court: He can ask him—don't put in "as follows" and read from the document. You can ask him if he signed such a document.

2344 Mr. Crossman: But that is just what he is going to do, he is going to look at the document.

2345 Mr. Stewart: As I understand it, the document on which the Society based its application for a transfer of this radio station, which Mr. Bradshaw has testified he was trying to get $800,000 for, the Society never even kept a record of that application?

2346 Mr. Wells: That is right.

2347 Mr. Stewart: That is right, is it?

2348 Mr. Wells: That is right.

2349 The Court: You can ask him if in the document [fol. 536] that he signed was contained this provision, or some other provision, but don't put it into the record by referring to this document.

2350 Q. Now, the document which you signed, Mr. Bradshaw, for a transfer of the license to this station WOW from the Society to the new company contained a provision, "Reasons for assignment of licensed property, for assignment of construction permit, or license, are as follows"——(interrupted)

2351 Mr. Crossman: That is just exactly what the Court ruled he could not do.

2352 The Court: All right, what I am getting at is, unless you can identify that document or until it is in evidence, I don't think you can inquire in reference to it, except impeach him. You can ask him if in the document which he signed, if he knows whether the document contained this provision, and then ask him what it did contain.

2353 Mr. Stewart: I am not asking him what this document contained. I am just asking him if it contained this provision.

2354 The Court: I know from the record in this case, but you cannot examine upon a document not in evidence, not admitted here.

2355 Mr. Stewart: That is all I propose to do. If I had been allowed to read about six or eight more words there I would have been through.

[fol. 537] 2356 Mr. Crossman: You were reading from the document.

2357 The Court: You should not refer to it, as to what it contains. Ask him if it did contain the thing indicated in the document. I don't know whether it is proper or not. Therefore it should not be in the record. Ask him if the document which he signed, the application contained something like this. You can go that far.

2358 Q. Isn't it a fact, Mr. Bradshaw, that the only reason given by you in the application which you signed in behalf of the Society for the transferring of the license to

the radio station was that the Society was convinced that the proposed lessee would continue to serve the public by rendering a high type of program service?

Mr. Crossman: That is objected to as incompetent, in the first place, because it refers to a written instrument neither identified nor in evidence, and is objected to in the second place for it is a plain violation of the Court's ruling, because I observed Mr. Stewart read right out of the document exactly as the Court told him not to do.

The Court: I think he can answer that question.

A. I don't know that it came in that place in the application, but I do know that a statement substantially as contained in your question was in the application.

Mr. Wells: That is right.

2359 Q. And that was the only reason given, wasn't it, Mr. Bradshaw?

[fol. 538] A. Now, you are talking about a record. I told you I don't know whether that was the only one or not, but that was one that was given. I told you others were given when we were presenting the matter to the Federal Communications Commission.

2360 Q. But I am talking about the application that was filed.

A. Well, I don't know. I remember that was stated somewhere in there. I don't know whether that point or not. I presume it was, but whether it was the only one or not, I don't know, because the record would show that, and I don't want to testify to a record that I have not seen in six months and don't know what is in it.

2361 Q. The record from which I have directed some questions——(interrupted)

2362 Mr. Wells: Are you offering it in evidence?

Mr. Crossman: We object to any offer. Is it identified?

Mr. Stewart: Let me finish, please.

The Court: If you want to, offer it in evidence.

2363 Q. The record from which I have directed some questions has been marked by the reporter as Exhibit No. 29, and I now tender it to the attorneys for the defendants and the witness, if they desire to examine it, and inasmuch as they have no copy of their own——(interrupted)

2364 Mr. Crossman: I don't mean to embarrass you about it.

2365 Mr. Stewart: No, I am trying to accommodate you, [fol. 539] to let you look at my copy, and if there is any other reason given for the assignment of the license to the lessee, that was submitted, as I asked Mr. Bradshaw, will you please call it to the attention of the Court?

2366 Mr. Crossman: Well, I would say that counsel will submit their own evidence without any suggestion as to what they will submit.

2367 The Court: Are you going to offer it, or lay a foundation for it?

2368 Q. Mr. Wells: Well, we object to this because it is not a complete document. There was about one-third of the questions answered in the original, and he should offer the complete document as filed.

2369 Mr. Stewart: Well, if there are any further answers to the questions upon the lease, we will supply that. I will certainly make no objection.

Mr. Crossman: I object to that being introduced in evidence in that form.

2370 Mr. Stewart: I didn't offer it in evidence. I want you to see it.

2371 The Court: I told him he should tender it to you.

2372 Mr. Stewart: I will offer in evidence Exhibit 29 as containing an answer or a statement referred to on Page 12 of the lease where the Society is assigning—is requesting approval of the transfer of the license to the station.

[fol. 540] 2373 Mr. Crossman: Might we look this over at the recess.

2374 The Court: Yes. We will take a fifteen-minute recess.

(Change of reporter.)

[fol. 541] 3:30 P. M., March 4, 1943.

Court convened pursuant to recess, same parties present as before, and the following proceedings were had:

2375 Mr. Wells: I want to make this statement, if Your Honor please, I have two witnesses here, Mr. Hines from Greensboro, North Carolina and Mr. Mooney of Chicago, who have been here all the week. They have their reserva-

tions and must necessarily get back, and the attorneys for Plaintiff have very graciously agreed that we may stop with Mr. Bradshaw and take that testimony if it is agreeable to the court.

2376 The Court: You may do that.

2377 Mr. Crossman: We withdraw any objections to Exhibit 29, although it is not complete and is not certified, and we assume it is correct as far as it goes, although it doesn't go very far.

2378 Mr. Stewart: I object to the statement that Exhibit 29 is not complete. There may have been other papers attached to it, but what is there, as I understand it, is complete.

2379 Mr. Wells: No; it is not.

2380 Mr. Stewart: I do wish to avoid any question about it, if you would try getting your own copy to see if anything I put in there isn't complete so far as the answer to that question is concerned.

2381 Mr. Crossman: That is complete; we don't question it.

2382 Mr. Stewart: All right.

Exhibit 29 is made a part of this record and attached hereto as follows:

[fol. 542] EXHIBIT "29"

FCC Form No. 314.

File Number B4-AL-354.
Call Letters WOW.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION

Application for Consent to Assignment of Radio Broadcast Station Construction Permit or License

(Submit application and all exhibits in duplicate to Federal Communications Commission, Washington, D. C. Swear to both copies. If space provided is insufficient—attach inserts.)

See Communications Act of 1934 and Rules of Practice and Procedure before executing application.

To the Federal Communications Commission:

Part I

(This part should be executed by assignor, or by the proper legal representative thereof in case of death or legal disability of assignor, unless application is made for involuntary assignment of license or construction permit to such a representative in which eevnt he should execute only Part 2 and the portions of Part 1 indicated in section 15 (b) Part 2).

Name and Identity of Assignor

1. Name of the assignor [1] Woodmen of the World Life Insurance Society.

2. Post office address: State: Nebraska, City: Omaha, Street and number: 17th & Farnam Streets.

[fol. 542-1] 3. Notices and communications with respect to this application are to be addressed to the following named person at the address indicated: De E. Bradshaw, Insurance Bldg., 17th & Farnam Sts. Omaha, Nebraska; George S. Smith, 1026 Woodward Bldg., Washington, D. C.

4. State whether assignor is an individual, a partnership, an association, a corporation, or other legal entity Corporation.

5. If assignor is a partnership—

(a) Give the State, District, Territory or Possession under the laws of which it is organized .....

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[1] The present lawful holder of the construction permit or license to be assigned. The name must be identical with that given on the construction permit or license. If assignor is a corporation, state the correct corporate name; if a partnership, give the names of all partners and the name under which the partnership does business; if an unincorporated associate, state the name of an executive officer, the office held by him, and the name of the association.

(b) Submit properly certified copies of the Articles of Co-partnership showing the purpose thereof with all amendments thereto.[2]

(c) Show the character and extent of the interest of each partner in the partnership .....

.....

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.....

(d) State the names of any limited or silent partners .....

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[fol. 542-2] 6. If assignor is a legal entity other than a corporation, partnership or individual—

(a) State fully the character of such legal entity .....

.....

.....

(b) Cite the laws under which organized and attach authenticated copies thereof.[2]

(c) Submit properly certified copies of the articles of association or other legal instrument under which assignor is organized showing the purpose thereof and the by-laws, if any together with all amendments thereto.[2]

(d) Give the name and address of each executive officer and member of the governing board and the office held by each .....

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.....

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[2] If any information or documents which are already on file with the Commission are required to be filed with the application, reference thereto should be made herein, giving file number of application with which filed and date of filing, together with a statement that there has been no change therein since date of filing thereof.

(e) Show the character and extent of the interest in assignor of each executive officer and member of the governing board

(f) Give the number of members

7. If assignor is a corporation—

(a) Give the State, District, Territory or Possession under the laws of which it is organized Nebraska.

(b) Submit copies of its articles of incorporation, with all amendments thereto, certified by the Secretary of State or other appropriate official, and by-laws, with all amendments thereto.[2]

Filed 8/5/32 and 11/8/37. No changes since filed.

[fol. 542-3] (c) Show the number of shares of each class of capital stock at present authorized, the par value, and the voting power of each. No capital stock—Fraternal Benefit Society.

(d) Show the number of shares of each class of stock issued and outstanding

(e) Give names and addresses of all directors and officers, and the office held by each.[2]

Directors

Name	Address

See report filed on Form 730 dated 9/17/41. No changes since filed.

[2] If any information or documents which are already on file with the Commission are required to be filed with the application, reference thereto should be made herein, giving file number of application with which filed and date of filing, together with a statement that there has been no change therein since date of filing thereof.

Officers

Name	Address	Office

See report filed on Form 730 dated 9/17/41. No changes since filed.

(f) If there are not more than 100 stockholders, give (1) the name, and address of each: (2) the number of each class of shares held; and (3) the percentage of total issued stock held by each. If more than 100 stockholders, give the information required herein with respect to all persons owning or controlling ten percent or more of the voting stock of assignor corporation.

[fol. 542-4]

Name	Address	Number and class of shares and percentage of issued stock owned or controlled

See answer to (c) on page 4 hereof.

(g) State in connection with the foregoing names the beneficial owner of the stock if other than the owner of record and give a statement of the conditions under which such stock is held. See answer to (c) on page 4 hereof.

8. (a) Is assignor corporation, directly or indirectly, controlled by any other corporation? No.

(b) If so, give full information with respect to how such control exists and the extent thereof .....

.....

.....

[fol. 542-5] (c) Give the name, address, principal place of business of such controlling corporation and the character of business engaged in .....

.....

.....

.....

(d) Give the State, District, Territory, or Possession under the laws of which it is organized .....

.....

(e) Show the number of shares of each class of capital stock authorized, the par value and voting power of each

.....

.....

(f) Show the number of shares of each class of stock issued and outstanding

.....

.....

(g) Give names and addresses of all directors, and officers, and the office held by each: [2]

Directors

Name	Address

[fol. 542-6]

Officers

Name	Address	Office

(h) Give (1) name and address; (2) the number of each class of shares held; and (3) the percentage of total issued stock held by each stockholder owning or controlling ten percent or more of voting stock of controlling corporation.

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[2] If any information or documents which are already on file with the Commission are required to be filed with the application, reference thereto should be made herein, giving file number of application with which filed and date of filing, together with a statement that there has been no change therein since date of filing thereof.

Name	Address	Number and kind of shares and percentage of issued stock held

(i) Is the above described controlling corporation in turn a subsidiary? ——— If so, attach additional sheets answering questions 8(a) to (i) inclusive, for each company, to and including the organization having final control.

[fol. 542-7 Assignor Party to Any Suit

9. (a) Is assignor now, or has assignor been, party to a suit in any Federal court involving the monopolizing, or an attempt to monopolize, radio communication directly or indirectly through control of the manufacture or sale of radio apparatus, by exclusive traffic arrangements, or by any other means, or of using unfair methods of competition? No.
(Answer yes or no)

(b) Is assignor directly or indirectly controlled by any person involved in such a proceeding? No.
(Answer yes or no)

(c) Is assignor party to any other suit or proceeding which may be affected by the proposed assignment? Yes.
(Answer yes or no)
If so, describe fully Assignor, in its capacity as licensee of radio station WOW, is a complainant in National Broadcasting Company, et al. vs. United States of America and Federal Communications Commission, No. 16-178 U. S. D. C. for the Southern District of New York.

Assignor's Interests

10. If assignor, or any partner, officer, member of the governing board, director, or principal stockholder has any

interest of any character whatever in, or any connection with, any of the following, there is submitted herewith a full and complete disclosure of the nature and extent of the interest in or connection with each. (If neither assignor nor any of said parties has any such interest or connection, so state.) .....

.....

.....

(a) Any application pending before the Commission, or which has been denied within twelve months preceding the date of execution of this application? None.

[fol. 542-8] (b) Any radio broadcast station? None except WOW.

(c) The assignee? None.

11. (a) If assignor has a substantial interest (25% or greater) in any business enterprise not disclosed on assignor's balance sheet or if assignor has any official relationship to any business enterprise there is submitted herewith full and complete disclosure of the name and principal place of business, the character of business engaged in, and the nature and extent of interest in or relationship to such business. Assignor's principal business is fraternal benefit life insurance. See balance sheet marked Exhibit 3.

(b) If assignor is other than an individual and any partner, officer, member of the governing board, director or principal stockholder, has a substantial interest (25% or greater) in any business enterprise or any official relationship to any business enterprise, there is submitted herewith a full and complete disclosure of the name and principal place of business, the character of business engaged in and the nature and extent of the interest in or relationship to such business of each. See answer to (a) above. Also see Form 730 dated 9/17/41 on file with F. C. C. No change since filed.

[fol. 542-9] The Assignment

(a) The Station Property, Equipment, etc.

12. Assignor represents that there are attached hereto the following returns:

(a) Inventory (Form 704) of station's technical and non-technical equipment and property. See Exhibit 1.

(b) Income Statement (Form 705) of assignor for the period between the date of the last statement filed with this Commission and the close of the month preceding the date of the application. See Exhibit 2.

(c) Balance Sheet (Form 706) of assignor as at the close of the month preceding the date of the application.[3] See Exhibit 3.

(b) Other Assets and Property

13. If any other organization, property, equipment or assets are involved in the proposal and not a part of the station and not shown in the returns submitted with this application, there are submitted herewith separate returns showing all such property, equipment or assets involved, the earnings and the financial condition of the company. If none, so state None.

(c) The Contract or Instrument of Conveyance

14. Assignor states:

(a) That the proposed assignment of license or construction permit involved herein, is based upon the transfer of the property and facilities of the station as shown by assignee's Exhibit 4, attached hereto which is joined in by assignor.

(b) That if said instrument is not jointly executed by assignor and assignee, the following is a full explanation thereof:

. . . . . .

. . . . . .

. . . . . .

[fol. 542-10] (d) Supplemental or Collateral Contracts

(c) That the only contract or other agreement whether written or oral which in any manner affects the proposed

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[3] If the contract or other instrument of conveyance (See Section 15, Part II) provides that any assets are not to be transferred to, or that any liabilities are not to be assumed by, assignee attach a rider to Balance Sheet and show the items of assets or liabilities so affected together with the resulting effect on the net worth shown in the balance sheet of the assignor submitted under the provisions of 12(c) above.

assignment is that submitted herewith as Exhibit 4. If there are other agreements or understandings which affect the assignment, they are submitted as Exhibits . If none, so state None.

(e) The Construction Permit or License

15. Assignor represents that it is the lawful holder of the following identified construction permit and/or license, authorizing the construction and/or operation of broadcast station WOW at Omaha, Nebraska.

(Call letters) (City and State)

(a) Construction permit, File No. , dated for Station granted on , requiring commencement of (Date) construction on , and completion of (Date) construction on (Date)

The status of said construction as of the date of the execution of this application is as follows:

(b) License, File No. B4-R-685, dated 3-17-42, for Station WOW, granted on 3-17-42, expiring on 6-1-44.

(Date) (Date)

16. Subject to the consent of the Commission, said construction permit and/or license, or any similar construction permit or license subsequently granted (is) (are) hereby transferred or assigned to Radio Station WOW, Inc.

(Assignee)

17. Assignor requests that the Commission grant its written consent to the foregoing assignment.

[fol. 542-11] Reasons for Assignment

18. Assignor's reasons or purposes for assignment of construction permit or license are as follows: Assignor is

convinced that the proposed Assignee will continue to serve the public by rendering a high type program service.

Exhibits Identified

19. There are attached hereto the following described and identified exhibits which have been prepared by assignor (if an individual or partnership) or by or under the direction of the officer or officers of assignor whose respective names and official titles appear opposite the exhibit prepared by each. (List here all assignor's exhibits.)

Exhibit number	Description of Information	Name of officer (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
1.	Inventory of Station Property	De E. Bradshaw (2)	President
2.	Income Statement of Assignor	De E. Bradshaw (2)	President
3.	Balance Sheet of Assignor	De E. Bradshaw (2)	President
4.	Contract Covering Assignment	De E. Bradshaw (2)	President
5.	Resolution of Board of Directors	Farrar Newberry (1)	Secretary

[fol. 542-12] Authority to Execute Application

20. (A) Assignor, if a legal entity other than an individual or partnership, states:

(a) That the execution of this application was duly authorized by Board of Directors at a meeting held at (Board of Directors or other governing body)

Omaha, Nebraska, on August 31, 1942.
(Place) (Date)

(b) That there are enclosed herewith properly certified copies of the resolution passed at said meeting affirmatively showing:

(1) That a quorum of members required by the by-laws having authority to act was present:

(2) That the resolution was voted upon favorably by a majority (or the number required by the by-laws) of those present and having authority to vote on the resolution:

(3) That the executive officer making the application, designated by name and title, was specifically authorized to verify and file the application.

See Exhibit 5.

[fol. 542-13] (B) If application is executed on behalf of assignor by attorney or proper legal representatives, there

is attached hereto as Exhibit (cogent evidence of his authority to act.

21. Assignor's most recent applications for construction permit and renewal of license are to be considered part of this application and the truth of the statements therein contained is hereby reaffirmed by assignor, except in so far as the contrary expressly appears herein and as follows: No exceptions.

22. All the statements made in the application and attached exhibits are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

Dated this 7th day of October, 1942.

Woodmen of the World Life Insurance Society. By (Name of assignor) (See footnote 1)

De E. Bradshaw (Signed) De E. Bradshaw, Pres.

Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state and show reasons therefor. Defective applications may be returned without consideration—Rule 4.02.

---

[1] Must be executed by assignor if an individual; by one of the partners of assignor if a Partnership, by an officer of assignor if a Corporation or Association, or by attorney of assignor only under conditions shown in Rule 7.01 in which event satisfactory evidence of disability of assignor or his absence from the Continental United States and authority of attorney to act must be submitted with application. If the assignment grows out of the death or legal disability of assignor this part of application must be executed by the proper legal representative who must submit satisfactory evidence of his authority to act. (See headnote, page 1 and section 20.)

[fol. 542-14] DISTRICT OF COLUMBIA,
City of Washington,
County of ....., *ss:*

De E. Bradshaw, being duly (Sworn upon his oath) (affirmed according to law) deposes and says that he is the President of .....

.....

(If assignor is not an individual, show official relationship of affiant to assignor)

above-named assignor, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements he believes them to be true. (See Rule 7.01).

(Signed De E. Bradshaw.
(Affiant)

Subscribed and sworn to before me this 7th day of October 1942.

Edith Z. Miller, Notary Public. (Seal.)

(Notary public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires Dec. 15, 1942.

[fol. 542-15] Part II

(To be executed by assignee in all cases of voluntary or involuntary assignment)

Name, Identity and Qualifications of Assignee

1. Name of assignee [5] Radio Station WOW, Inc.

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[5] The party to whom it is proposed to assign the construction permit or license. If a corporation, state correct corporate name; if a partnership, give the names of all partners, and the name under which the partnership does business; if an unincorporated association, state the name of an executive officer, the office held by him and the name of the association.

2. Post office address: State Nebr.; City, Omaha; Street and number Insurance Bldg., 17th & Farnam Sts., Omaha, Nebr.

3. Notices and communications with respect to this application are to be addressed to the following named person- at the address indicated: John J. Gillin, Insurance Bldg., 17th & Farnum Sts., Omaha, Neb.; George S. Smith, 1026 Woodward Bldg., Washington, D. C.

4. Is this application for—

(a) Consent to voluntary assignment of construction permit Yes and/or license.

(b) Consent to involuntary assignment of construction permit and/or license .....

5. State whether assignee is an individual, a partnership, an association, a corporation, or other legal entity Corporation.

[fol. 542-16] 6. If assignee is an individual—

(a) Is assignee a citizen of the United States?
(Answer yes or no)

(b) If citizenship is claimed by reason of birth, state date and place of birth .....

(c) If citizenship is claimed by reason of naturalization, state the date and place of birth, the date and place of issuance of final certificate of naturalization, the certificate number and court authorizing the issuance of same .....

.....

(d) If citizenship is claimed by reason of naturalization of a parent, state the name of the parent to whom the final certificate was issued, and the age of assignee at the time said certificate was issued, in addition to the information required by sub-paragraph (c) hereof .....

.....

(e) Where has assignee resided during the past 5 years? .....

(f) State assignee's occupation or profession and length of time engaged therein

(g) If assignee is, or within the past 5 years has been, employed by or associated with another, state fully the name and business address of each employer or associate, the character of business, and the nature of assignee's employment or association therein, together with the length of time so employed or associated

[fol. 542-17] (h) Submit any additional facts relied upon by assignee showing his ability and qualifications to continue the operation of the station, including education, training and experience

7. If assignee is a partnership—

(a) Give the State, District, Territory or Possession under the laws of which it is organized

(b) Submit properly certified copies of the Articles of Co-partnership showing the purpose thereof with all amendments thereto.[2]

(c) Submit here the name, address, citizenship,[6] and date and place of birth of each partner

[6] Wherever citizenship of any party is to be established, proof thereof must be submitted as required under Section 6 (b), (c), or (d).

(d) Where has each partner resided during the past 5 years?

(e) State the occupation or profession of each partner and length of time engaged therein

{fol. 542-18] (f) If any partner is, or within the past 5 years has been, employed by or associated with another, state fully the name and business address of each employer or associate, the character of business, and the nature of partner's employment or association therein, together with the length of time so employed or associated

(g) Submit any additional facts relied upon by each partner, showing his ability and qualifications to continue the operation of the station, including education, training and experience

(h) Show the character and extent of the interest of each partner in the partnership

(i) State the names of any limited or silent partners

[fol. 542-19] 8. If assignee is a legal entity other than a corporation, partnership or individual—

(a) State fully the character of such legal entity

(b) Cite the laws under which organized and attach authenticated copies thereof.[2]

(c) Submit properly certified copies of the articles of association or other legal instrument under which assignee is organized showing the purpose thereof, and the by-laws, if any, together with all amendments thereto.[2]

(d) Give the name, address and citizenship[6] together with the date and place of birth of each executive officer and member of the governing board and the office held by each

(e) Give the number of members

(f) Are any officers, members of the governing board, or other members aliens? . If so, give here the name, address, nationality, and date and place of birth of each alien, showing office held, if any

(g) Where has each executive officer or member of the governing board resided during the past 5 years?

[fol. 542-20] (h) State the occupation or profession of each executive officer or member of the governing board and the length of time engaged therein

(i) If any executive officer or member of the governing board is, or within the past 5 years has been, employed by or associated with another, state fully the name and business address of each employer or associate, the character of business, and the nature of the employment or association therein of the executive officer or member of the governing board, together with the length of time so employed or associated

(j) Submit any additional facts relied upon by the assignee, or by any of its executive officers or members of the governing board, showing ability and qualifications to continue the operation of the station, including education, training and experience

[fol. 542-21] (k) Show the character and extent of the interest in assignee of each executive officer and member of the governing board

9. If assignee is a corporation—

(a) Give the State, District, Territory or Possession under the laws of which it is organized. Nebraska.

(b) Submit copies of its articles of incorporation, with all amendments thereto, certified by the Secretary of State or other appropriate official, and by-laws, with all amendments thereto.[2] Attached hereto as Exhibit A.

(c) Set out specifically the charter powers relied upon by the assignee corporation to show that it is legally empowered to operate a broadcast station. Article Third (1) of Exhibit A.

(d) Is station located in a State or jurisdiction other than that in which assignee corporation is organized? No. If so, submit certified copies of a certificate from the appropriate State official where station is located showing it is legally empowered to do business therein. If no such authority is required of non-resident corporations, specifically so state.

(e) Show the number of shares of each class of capital stock at present authorized, the par value, and the voting power of each. Class A preferred, 750 shares; Class B preferred, 250 shares; Common, 1000 shares. Par value of all stock is $1.00 per share. One vote per share for all stock.

[fol. 542-22] (f) Show the number of shares of each class of stock issued and outstanding. Class A preferred, 750 shares. Class B preferred, 250 shares. Common, 1000 shares.

(g) Give names, addresses and citizenship[3] of all (1) incorporators, (2) directors, and (3) officers, and the office held by each.

Incorporators—See Exhibit B

Name	Address	Citizenship
John J. Gillin, Jr.,	Omaha, Nebr.,	U. S. A.
Guy C. Myers,	Seattle, Wash., & N. Y., N. Y.,	U. S. A.
M. M. Meyers,	Omaha, Nebr.,	U. S. A.
Robert Samardick,	Omaha, Nebr.,	U. S. A.
Harvey E. Milliken,	Omaha, Nebr.,	U. S. A.

J. J. Isaacson, Omaha, Nebr., U. S. A.
Francis P. Matthews, Omaha, Nebr., U. S. A.
Thomas J. Wallace, Winnetka, Illinois, U. S. A.

Directors

Name Address Citizenship

The Board of Directors consists of the eight incorporators listed immediately above.

Officers

Name Address Office Citizenship

John J. Gillin, Omaha, Nebr., President, U. S. A.
Guy C. Myers, Seattle, Wash., & N. Y. C., Vice Pres., U. S. A.
M. M. Meyers, Omaha, Nebr., Secretary, U. S. A.
Harvey E. Milliken, Omaha, Nebr., Treasurer, U. S. A.

. . . . . .

. . . . . .

[fol. 542-23] (h) If there are not more than 100 stockholders, give (1) the name, address and citizenship[6] of each; (2) the number of each class of shares held; and (3) the percentage of total issued stock held by each. If more than 100 stockholders, give the information required herein with respect to all persons owning or controlling ten per cent or more of the voting stock of assignee corporation.

Name	Address	Citizenship	Number and class of shares and percentage of issued stock owned or controlled	
John J. Gillin,	Omaha, Nebr.,	U. S. A.	250 Class B, Preferred	100%
			100 Class A, Preferred	13.3%
			350 Common	35 %
Guy C. Myers,	Seattle, Wash.,	U. S. A.	250 Class A, Preferred	33.3%
			250 Common	25 %
Francis P. Matthews,	Omaha,	U. S. A.	100 Class A, Preferred	13.3%
			100 Common	10 %
Thos. J. Wallace,	Winnetka, Ill.,	U. S. A.	100 Class A, Preferred	13.3%
			100 Common	10 %
Harvey E. Milliken,	Omaha,	U. S. A.	50 Class A, Preferred	6.6%
			50 Common	5 %
M. M. Meyers,	Omaha,	U. S. A.	50 Class A, Preferred	6.6%
			50 Common	5 %
J. J. Isaacson,	Omaha,	U. S. A.	50 Class A, Preferred	6.6%
			50 Common	5 %
Robt. Samardick,	Omaha,	U. S. A.	50 Class A, Preferred	6.6%
			50 Common	5 %

(i) State in connection with the foregoing names the beneficial owner of the stock if other than the owner of record and give a statement of the conditions under which such stock is held. The owners of record are the beneficial owners of the stock.

(j) Is more than one-fifth of capital stock owned of record or may it be voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country? No.

[fol. 542-24] (k) Show in the appropriate columns below the information with respect to the number of shares outstanding at the last meeting of the shareholders, together with the number voted in person by holder of record, by proxy, and, separately, those voted by officials of the company and others, as provided for.

Number voting Shares outstanding last meeting of shareholders	Number shares voted at such last meeting In person by holder of record	By proxy	Votes under proxy held by Officers or directors	Security holders	Others
2000	1200				

(l) Does assignee contemplate sale of any stock or other security? No. If so, state:

(1) The full purposes thereof .....

.....

.....

(2) The number of shares of each class and the par value of shares to be sold .....

.....

.....

.....

(3) The character and amount of other securities to be sold .....

.....

.....

.....

(4) To whom the stock or securities is to be sold .....

.....

(5) What consideration and/or other benefit from such sale is to be received by assignee

[fol. 542-25] (6) What consideration and/or other benefit from such sale is to be received by any other parties

'm) Submit any additional facts relied upon by assignee, showing its ability and qualifications to continue the operation of the station. John J. Gillin, Jr., President of the assignee corporation, will continue to be general manager of WOW and no changes in staff are contemplated. The officers, directors and stockholders of the assignee corporation are public spirited citizens representative of the best interests of WOW's audience.

10. (a) Is assignee corporation, directly or indirectly, controlled by any other corporation? No.

(b) If so give full information with respect to how such control exists and the extent thereof

(c) Give the name, address, principal place of business of such controlling corporation and the character of business engaged in

[fol. 542-26] (d) Give the State, District, Territory or Possession under the laws of which it is organized

(e) Show the number of shares of each class of capital stock authorized, the par value and voting power of each

(f) Show the number of shares of each class of stock issued and outstanding

(g) Give names, addresses and citizenship [6] of all (1) incorporators, (2) directors, and (3) officers, and the office held by each:

Incorporator

Name	Address	Citizenship

Directors

Name	Address	Citizenship

[fol. 542-27]

Officers

Name	Address	Office	Citizenship

(h) Give (1) name, address and citizenship [6]: (2) the number of each class of shares held; and (3) the percentage of total issued stock held by each stockholder owning or

controlling ten per cent or more of voting stock of controlling corporation.

Name	Address	Citizenship	Number and kind of shares and percentage of issued stock held

(i) Is more than one-fourth of capital stock of such controlling corporation owned of record or may it be voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country?

[fol. 542-28] (j) Is the above-described controlling corporation in turn a subsidiary? . . If so, attach additional sheets answering question 10 (a) to (j), inclusive, for each company, to and including the organization having final control.

11. (a) Is assignee a representative of an alien or foreign government? No.

(b) If assignee is other than an individual, is any partner, member, officer, director, or stockholder a representative of an alien or foreign government? No; If so, give the name, address and citizenship of such party, the position, if any, with assignee, and a full disclosure concerning such representation

12. (a) Has any license previously held by assignee for the operation of a radio station subject to the Communica-

tions Act ever been revoked? No. If so, state fully

(b) Is assignee directly or indirectly controlled by any person whose license has been revoked? No.

(Answer yes or no)

(c) Has any application of assignee for renewal of license for a radio station subject to the Communications Act ever been denied? No. If so, identify the license.

(Answer yes or no)

Assignee Party to Any Suit

(d) Is assignee now, or has assignee been, party to a suit in any Federal court involving the monopolizing, or an attempt to monopolize, radio communication directly or indirectly through control of the manufacture or sale of radio apparatus, by exclusive traffic arrangements, or [fol. 542-29] by any other means, of using unfair methods of competition? No.

(Answer yes or no)

(e) Is assignee directly or indirectly controlled by any person involved in such a proceeding? No.

(Answer yes or no)

(f) Is assignee party to any other suit or proceeding which may be affected by the proposed assignment? No.

(Answer yes or no)

If so, describe fully

13. Has assignee, or if assignee is other than an individual, has any partner, member, officer, director, or principal stockholder been found guilty of any felony or other crime involving moral turpitude? No. If so, give the name and address of such person, the position, if any, with assignee, together with a full description of the offense committeed, the date when, and the court before which convicted, and reference to the official record

Assignee's Financial Qualifications

14. Assignee represents—

(a) That there is attached hereto, on Form 706, a detailed balance sheet of the assignee, as at the close of the month preceding the date of the application, showing assignee's financial ability to continue the operation of the station.[7]

[7] If the financial showing of assignee is augmented by agreements of others to advance money or to subscribe to stock of assignee, submit verified copies of the agreements by which the parties are legally obligated together with detailed financial statements of each such party.

See Exhibit C

[fol. 542-30] (b) That the following is a full statement with respect to any securities or obligations of assignor held by assignee (or by any person or company controlling assignee), including the character and amount thereof, length of time held, manner and circumstances of acquisition, and that there are attached verified copies of all agreements or other legal instruments evidencing the acquisition. (If no such securities or obligations are held, specifically so state) None.

Assignee's Authority over the Station, Property, Etc.

15. Assignee represents—

(a) That if its control over the station, its property and equipment arises out of:

(1) voluntary agreement[8] with assignor, verified copies thereof are attached hereto as Exhibit 4;

[8] Any contract, lease or other voluntary agreement under which assignee claims control over the station must specifically show (1) assignee will have complete control over

(2) involuntary action [9], cogent evidence thereof is submitted herewith as Exhibits .

[fol. 542-31] (b) If assignment is involuntary and to the proper legal representative of assignor (i. e., guardian, administrator, executor, trustee, referee, etc.) and Part I of application is not executed (See headnote, page 1) such representative must execute sections 12, 13, 14, 15, 16, 18, and 21 of Part I.

(c) (If assignee will not be owner of station) That the name and address of owner are as follows—Woodmen of the World Life Insurance Society is the lessor of the physical properties but lessee has full charge and control of the station. See Exhibit 4.

(d) That it will have and maintain absolute control of the station, its equipment and operation, including unlimited supervision of the programs to be broadcast. Yes.

(e) That if there are any contracts or other legal instruments which affect in any manner assignee's control, they are submitted herewith as Exhibits . . . . . (If any oral understanding exists, same must be reduced to writing and submitted.) If none, so state. None except Exhibit 4.

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all necessary physical property and its use and unlimited supervision over the programs to be broadcast, (2) consideration whether monetary or otherwise and whether paid or promised, (3) all other terms and conditions involved in the assignment, including a statement that the instrument submitted covers the entire arrangement between the parties (If it does not, all other pertinent legal instruments must be submitted), (4) assignment is subject to consent of the Commission.

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[9] Set forth fully in appropriate exhibits a full narrative statement of the character and status of proceeding (i. e., bankruptcy, dissolution, etc. or operation of law in any other manner), showing all parties thereto, and attach copies of all pleadings and court orders properly certified by the clerk of the court having jurisdiction over the matter.

Assignee's Interests

16. If assignee, or any partner, officer, member of the governing board, director, or principal stockholder has, or has had, any interest of any character whatever in, or any connection with, any of the following, there is submitted herewith a full and complete disclosure of the nature and extent of the interest in or connection with each. (If neither assignee, nor any of said parties, has, or has had, any such interest or connection, so state)

(a) Any application pending before the Commission, or which has been denied within twelve months preceding the date of execution of this application? None except as John J. Gillin, Jr., has been connected with WOW as general manager.

(b) Any radio broadcast station? None except as in (a). [fol. 542-32] (c) The assignor? None except as in (a).

17. (a) If assignee has a substantial interest. (25% or greater) in any business enterprise not disclosed on assignee's balance sheet or if assignee has any official relationship to any business enterprise, there is submitted herewith full and complete disclosure of the name and principal place of business, the character of business engaged in, and the nature and extent of interest in or relationship to such business. None.

(b) If assignee is other than an individual and any partner, officer, member of the governing board, director or principal stockholder, has a substantial interest (25% or greater) in any business enterprise or any official relationship to any business enterprise, there is submitted herewith a full and complete disclosure of the name and principal place of business, the character of business engaged in and the nature and extent of the interest in or relationship to such business of each. See Exhibit B.

Proposed Service

18. Assignee represents—

(a) There is submitted below an analysis of the number of hours proposed to be devoted monthly to the types of

programs indicated, including the percentage of the total monthly time which it is proposed to operate the station:

[fol. 542-33]

Commercial Programs		Sustaining Programs	
Number of Hours	Percentage of total Monthly Hours Station Operated	Number of Hours	Percentage of total Monthly Hours Station Operated
366		225	
(1) Entertainment	53	(1) Entertainment	29
(2) Education	9	(2) Educational	6
(3) Religious		(3) Religious	1
(4) Agricultural		(4) Agricultural	2
(5) Fraternal		(5) Fraternal	
(6)		(6)	
(7)		(7)	

(b) There are attached hereto copies of typical daily programs showing the character of service proposed to be rendered. See Exhibit D.

19. (a) Does assignee expect to obtain programs from what is known as a "chain"? Yes.

(b) Name of chain or chains, NBC.

(c) What will be the percentage of total time proposed to be used for chain programs (i. e., programs, both paid and sustaining, which are duplicated by any other station)? 52%.

(d) What will be the percentage of total time proposed to be used for mechanical reproduction (i. e. phonograph records, electrical transcriptions, player piano, etc.)? 20%.

Copies of network contracts on file with Renewal Application dated Jan. 20, 1942.

Full Information

20. Assignee states that if any further showing is necessary in order fully to describe the proposal involved in this application, or to supply full information with respect

thereto as required by the Communications Act, or if the proposal involves any change in the station with respect to construction, location, facilities, operation, service, assets, obligations or otherwise not already fully explained, the following is a complete disclosure with respect thereto. No such showing necessary.

Reasons for Assignment

[fol. 542-34] 21. (a) Give here the reasons for the proposed assignment, the specific objects sought, and benefits to be attained upon the approval of this application.

Assignee expects to continue to render the same high grade service that WOW has given its listeners heretofore.

(b) Show here any new service, additional service, or betterments in service which will result from the approval of this application.

Assignee expects to keep WOW abreast of the developments in the art and to improve service whenever possible.

22. There are submitted herewith the names and addresses of all counsel (legal, engineering, or accounting), together with the name and address of firm, if any, with which connected, who have prepared, or assisted in the preparation of, the application and exhibits. (Show opposite the name of each the part of application or specific exhibit or exhibits prepared.) Breed Abbott and Morgan, attorneys, 15 Broad St., New York City, represented the assignee in the preparation of Exhibit 4. (lease)

De E. Bradshaw, attorney and President, represented Woodmen in the preparation of Exhibit 4. (lease)

Segal, Smith & Hennessey, attorneys, assisted the assignor and assignee with the preparation of this application.

Authority of Any Other Regulatory Agency Obtained

23. If any part of the proposal involved in this application is subject to regulation or approval by any other Federal or State body, show here the character and status of such proceeding and submit certified copies of all pleadings filed therewith, together with any orders issued by said body. None necessary. Francis P. Matthews, attor-

ney, Omaha, advised in respect to incorporation under Nebraska Laws. Assignee.

[fol. 542-35] Exhibits Identified

24. There are attached hereto the following described and identified exhibits which have been prepared by assignee (if an individual or partnership) or by or under the direction of the officer or officers of assignee whose respective names and official titles appear opposite the exhibit prepared by each. (List here all assignee's exhibits.)

Exhibit Number	Description of Information	Name of Officer (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title
A.	Articles of Incorporation,	J. J. Gillin, Jr., (2)	Pres.
B.	Interests of stockholders, etc. and Citizenship	J. J. Gillin, Jr., (2)	Pres.
C.	Balance Sheet	J. J. Gillin, Jr. (2)	Pres.
D.	Typical Daily Programs	J. J. Gillin, Jr. (2)	Pres.
E.	Resolution of Board of Directors	Francis P. Matthews (2)	Pres.

[fol. 542-36] Assignment is Civil Action Only

25. Subject to the granting of consent hereto, assignee assumes all obligations and agrees to abide by all conditions which have been imposed by the Commission upon assignor under the Construction Permit or License which is the subject of the assignment; provided, however, that nothing contained herein shall be construed that assignee assumes any liability whatever for any wrongful act done by assignor, with respect to any right which may have accrued, or under any suit or proceeding had or commenced against the assignor.

26. Assignee waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests consent to the assignment of this license and/or construction permit in accordance with this application.

Authority to Execute Application

27. (A) Assignee, if a legal entity other than an individual or partnership, states:

(a) That the execution of this application was duly authorized by Board of Directors.

.....
(Board of Directors or other governing body)

at a meeting held at Omaha, Nebraska .....
(Place)

on October 3, 1942 .....
(Date)

(b) That there are enclosed herewith properly certified copies of the resolution passed at said meeting affirmatively showing: See Exhibit E.

(1) That a quorum of members required by the by-laws having authority to act was present;

(2) That the resolution was voted upon favorably by a majority (or the number required by the by-laws) of those present and having authority to vote on the resolution;

(3) That the executive officer making the application, designated by name and title, was specifically authorized to verify and file the application.

[fol. 542-37] (b) If application is executed on behalf of assignee by attorney, there is attached hereto as Exhibit ..... cogent evidence of his authority to act.[10]

28. All the statements made in the application and attached exhibits are considered material representations,

---

[10] Must be executed by assignee if an individual; by one of the partners of assignee, if a partnership; by an officer of assignee, if a corporation or association, or by attorney of assignee only under conditions shown in Rule 7.01 in which event satisfactory evidence of disability of assignee or his absence from the continental United States and authority of attorney to act must be submitted with application. (See headnote page 1).

and all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

Dated this 7th day of October, 1942.

Radio Station WOW, Inc.
(Name of assignee) [5]
By John J. Gillin, Jr.,
President
(Authorized Officer or Attorney) [10]

Be sure all necessary information is furnished and all questions are fully answered. If any portions of the application are not applicable, specifically so state and show reasons therefor. Defective applications may be returned without consideration—Rule 4.02.

[fol. 542-38] District of Columbia,
City of Washington, ss:

John J. Gillin, Jr., being duly sworn upon his oath, affirmed according to law, deposes and says that he is the President of .....
(If assignee is not an individual, show official relationship of affiant to assignee.)

above-named assignee, and that the facts stated in the foregoing application and all exhibits attached thereto are true of his own knowledge, except as to such statements

---

[5] The party to whom it is proposed to assign the construction permit or license. If a corporation, state correct corporate name; if a partnership, give the names of all partners, and the name under which the partnership does business; if an unincorporated association, state the name of an executive officer, the office held by him and the name of the association.

[10] Must be executed by assignee if an individual; by one of the partners of assignee, if a partnership; by an officer of assignee, if a corporation or association, or by attorney of assignee only under conditions shown in Rule 7.01 in which event satisfactory evidence of disability of assignee or his absence from the continental United States and authority of attorney to act must be submitted with application. (See headnote page 1.)

as are therein stated on information and belief, and as to such statements he believes them to be true. (See Rule 7.01).

John J. Gillin, Jr.,
Affiant [10]

Subscribed and sworn to before me this 7th day of October , 1942.

Edith Z. Miller, Notary Public. [Seal.] My commission expires Dec. 15, 1942.

(Notary Public's seal must be affixed where law of jurisdiction requires, otherwise state that law does not require seal.)

[fol. 543] CHARLES A. HINES, Called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

2383 Q. Please state your name, residence and your occupation?

A. Charles A. Hines, Greensboro, North Carolina; attorney at law—that is my general business and profession.

2384 Q. Are you connected in any way with the Woodmen of the World Life Insurance Society and if so, how?

A. Yes; I have been a member since 1914. I have been a member of the Sovereign Camp since 1917, and I have been a member of the Board of Directors since December, 1935.

2385 Q. As a member of the Board of Directors are you also one of the auditors?

A. I am.

2386 Q. How long have you been one of the auditors?

A. About two years.

2387 Q. What are your duties as an auditor?

A. We are required under the by-laws of the Society to come to Omaha twice a year, examine the books, accounts, records and business generally of the Society, and make reports to the Board of Directors.

2388 Q. Have you attended meetings of the Board of Directors regularly since you became a member?

A. I have attended every meeting.

2389 Q. And of the Sovereign Camp?

[fol. 544] A. I have.

2390 Q. Pardon me—when did you say you became a member of the Board?

A. December, 1935, a little over seven years ago.

2391 Q. Since and while you have been a member of the Board of Directors and participated in its proceedings, have you been advised of the consideration that has been given to the disposition of the radio station WOW that has been owned and operated by this Society?

A. I think I am fairly familiar with the discussions and action of the Board, and by conversations to some extent, with the work that has been done by the president in his efforts to dispose of the station.

2392 Q. What was your opinion as to what, disposition or continuation of the operation of the radio, should be done by the Society?

Mr. Stewart: That is objected to as incompetent; the records of the Society show in the proceedings of the Board of Directors and is the best evidence of the action taken and the attitude of the Board of Directors toward the disposition of the radio station.

The Court: Oh, I think he may answer. You should fix the time.

Mr. Wells: Up to the time this proceeding came in.

A. When I first came on the Board I had an idea that the radio station was a good thing for the Society, and at that time I think it was, but within the last two years the trends of taxation, the uncertainty of business generally [fol. 545] and the radio business in particular, and the amount of difficulties encountered, caused a gradual change in my opinion until I would say a year or more ago I came to the conclusion that we ought not to continue the operation of it.

2393 Q. For what reason do you think you should not continue the operation of it?

A. Well, primarily the tax. I know in my own state, for instance, the profits from the radio station would be taxable, and I know the tendency in that direction. I was also in-

formed of the attitude of the Treasury Department in evidence here, and I saw the trend of the situation there, which would not only take the proportionately large profits of the radio station as compared with investment, but would also subject us to taxation upon what might be called excess income, income above the required reserves of the Society.

2394 Q. Are you the same Charles A. Hines that signed a report to the Board of Directors, to this Society on August 27, 1942, with William E. Mooney, Robert G. Plunkett and W. C. Braden, copy of which I hand to you?

A. That was the report which was offered in evidence a day or so ago. I am the same person.

2395 Q. As a member of that committee please state what investigation the committee made and what you had before you at that time?

Mr. Stewart: That is objected to as incompetent, irrele- [fol. 546] vant and immaterial, not the best evidence, and the action taken by the committee is set forth in the report that has already been received in evidence, and is based on the report of the president, which has already been received in evidence.

2396 The Court: You mean at the time he made that report?

Mr. Wells: Yes.

2397 The Court: At the time of——

Mr. Wells: Yes sir.

The Court: You may answer the question—not what he had before him in the official session.

Mr. Wells: No, sir, in the committee.

The Witness: Yes, I understand—what we had in the committee.

2398 Mr. Stewart: Do I understand the Court to say he couldn't discuss what was before him at the time in the committee?

The Court: When he made the report.

2399 Mr. Stewart: That he can say what was before them then?

The Court: Not then—at the meeting of the Board, what was there.

2400 Mr. Wells: He is undertaking to discuss the deliberations of the committee.

The Court: He can do that all right.

Mr. Wells: Yes sir; that is what he says.

[fol. 547] A. We had before us the reports that had theretofore been made by the president. We also considered the financial reports that had been made from time to time by the radio station, and the profits that had been made over the years. We had a form of lease which is substantially the form you have here as to character and various paragraphs of the lease, which same paragraphs have since been added,—the general form—we had at that time before us articles of a limited partnership, because we were told that at that time Mr. Gillin and those associated with him were considering either a corporation or a limited partnership as their organization, and we examined the statutes of Nebraska with reference to limited partnerships, but expected the general attorney of the Society to make the lease and draft its form, so we made only one or two suggestions with reference to that. We talked at considerable length with President Bradshaw about his negotiations, and he also gave us a memorandum of the rental for the radio station and for the space in the building that the lessee would also take in connection with the main lease of the station, and those figures are the same as are in the leases that were finally executed, that is, the monthly rental for the radio station and properties, and for the space in the building. If I didn't say it, I do say that Mr. Bradshaw recounted at some length his efforts about making a sale or a lease of the station, and had from time to [fol. 548] time before that talk with various members of the committee.

At this time we also talked with Mr. Ruess who knew more about the radio station than anyone else. I believe we collectively, as a committee, talked with Mr. Wells about some of the legal features and possibility of early taxation of a business of this kind.

Then after conference with Mr. Bradshaw, and I believe the next day, this committee composed of Mr. Plunkett, Mr. Mooney, Mr. Braden and myself met apart from any other members of the Board, and talked that matter through at length, and after doing so, and making some further inquiries, we drafted a report and either that day or the next day submitted it to several of the Board of Directors.

2401 Q. And what you submitted—did you also draw the resolution that has been marked Exhibit 10?

A. We drew the resolution.

2402 Q. Since 1937, continuously from then on, had this matter been discussed generally from time to time, that is, the advisability of continuing the operation or disposing of the radio?

A. During the first two or three years I don't recall that a great deal was said; I do recall that almost from the beginning of my membership on the Board, Mr. Newberry, the Secretary, and Colonel Patterson, the Vice-President of the Society, would bring up informally from time to time the matter of the radio station, and I learned that they felt we should dispose of it, should not be in that business. [fol. 549] That was aside from taxation or any other reason; they just thought it was not a business for a fraternal Society, that it had grown out of proportion from what it had been and was no longer of any particular advertising value to the Society because it didn't reach more than ten percent, if that many, of the members, and that too much of the time of the officers was given to this when they ought to be pushing the insurance and fraternal sides of the Society.

2403 Q. How many members of this Society are there in North Carolina?

A. About 21,000.

2404 Q. What influence did the operation of the radio have on the membership in North Carolina?

Mr. Stewart: Objected to as immaterial.

The Court: If you know.

2405 Q. Mr. Wells: Do you know?

The Witness: I think I do.

2406 Mr. Wells: What is it?

A. Not the least bit. I listen to the radio a great deal, and I have not been able to get WOW in fifteen years on my radio.

2407 Q. Just a nonentity?

A. It doesn't mean a thing to us there.

2408 Q. Because they don't know the radio was operated by the Woodmen of the World, that the Woodmen of the World operated a radio station?

A. Yes, I think a good many of them do; it is mentioned [fol. 550] from time to time in the magazine; the more active members know because of its initials and otherwise,

that it does belong to this Society, but, of course, they don't hear it down there anymore.

2409 Q. Then it does not increase their interest or entertainment or education in any way because they just can't hear it?

A. No sir; they don't listen, or it can't be heard. I think I would be safe in saying that our members do not listen to the radio programs because other stations with that wave length are nearer.

2410 Q. What was the reason for reaching this conclusion that this disposition should be made of this radio station?

A. Taxation primarily; the other reasons left me rather doubtful as to whether or not it was worth while or for the best interests of the Society, but the reason that moved me finally was that I saw—I believed that in a reasonable time these profits would be taxed so there would be very little profit left, and then we would be exposed to the danger of taxes not only of the radio station but other income, and also the feeling that the best days of radio of this type are gone; we have either got to go into television or into competition with telephone companies; they are going to have a different type of amusement and program communication as soon as the war is over.

2411 Q. Do you think that created any good will for the [fol. 551] Society in North Carolina or in the southern states?

A. None whatever in the last ten years. Now, you understand this station could be heard in North Carolina fifteen years ago.

2412 Q. Why can't you hear it now, do you know?

A. Yes, from what I know about it, because there are two or three stations nearer that have that same wave length or kilocycles.

2413 Q. You are not a resident member of the Board of Directors?

A. No sir.

2414 Q. How often do you come here to attend a meeting of the Board of Directors or the auditors?

A. I was here twice last year; I was here in February of this year—usually twice a year.

2415 Q. You were here in February of this year?

A. Yes.

2416 Q. And discharging your duties as auditor, in February of this year, did you examine the insurance policies carried by Radio Station WOW Inc.?

A. I did; the chairman asked me to examine all the policies of insurance that we carried of every type, and I examined the radio insurance particularly to see that policies had been written that would be for the interests of both WOW Inc., and for the Society, and particularly for the Society. I found that all types of insurance that had been [fol. 552] carried heretofore were now being carried in the names of both lessor and lessee. That included all such things as fire insurance, even war damage, tornado and liability, public liability.

2417 Q. You have read the lease, have you, Exhibit 13?

A. I heard it read. I don't believe I have read it, but I heard it read in court.

2418 Q. Well, the tentative form you had when your committee was examining it, you read that?

A. Yes.

2419 Q. Included in substance in the final lease?

A. It is in it, the recommendations that the committee made in a side memorandum that was handed to someone at the time we made this report.

2420 Q. How long have you been a practicing lawyer?

A. Thirty-five years.

2421 Q. In examining this lease do you consider any of the provisions of that lease are detrimental to the Society and its members?

A. I wouldn't think anything was detrimental.

2422 Q. Do you think this Society is fully protected in this lease?

A. I do; otherwise I would not have voted for it.

2423 Q. It is charged here the resident directors dominated and controlled you men who do not live here: is that true or not?

A. Well, those are elastic words but in no sense would I say that they dominate or control us or undertake to do it.

2424 Q. Well, in this particular transaction was there any evidence of anybody undertaking to dominate and control [fol. 553] the situation and enforce the consummation of this lease?

A. Absolutely not. I might say that the type of men who live away from here, as well as those who live here and are

on the Board, are rather the type of men who would go the other way if you undertook to control them or dominate them. Several of them are lawyers, men accustomed to making up their own minds and they have definite and aggressive opinions about matters, and they are just not the type to be easily led or dominated.

2425 Q. Did you make up your mind without any persuasion or influence or assistance on behalf of Mr. Bradshaw or any of these other men on the matter?

A. Absolutely without any persuasion on their part, but largely on a matter of information imparted by them.

2426 Q. It has been introduced in evidence here, Judge Hines, the original report, original resolution where it says in paragraph one, "That the President be and he is hereby authorized to negotiate sale or lease, or lease and sale, subject to the lease, of the radio station, property and assets, other than cash and accounts above $25,000." The original $25,000 seems to have been written on the report in pen and ink and then marked out: do you know about that?

A. I know to this extent about it: at the time the original report was prepared and before it was signed—no, and up to the time it was signed—no, it is the resolution—the above $25,000 was not in the resolution, but when I offered the [fol. 554] resolution in the meeting of our Board, Mr. Bradshaw or someone called my attention to the fact, which was true and which he had told us, that the lessee was to have accounts to the amount of $25,000 to be a sort of revolving fund, otherwise, until it made a month's collections it would be without working capital.

2427 Q. Did you write that in there?

A. And I took the resolution to another typewriter which was in an adjoining room to where we were meeting, and myself put in the words "above $25,000". Now, there was some discussion about that afterwards, and the question of whether or not that would tie the hands of the president in further negotiations so he could know the $25,000 could be devoted to that purpose, but I didn't think it was marked there at the time it was passed by the Board of Directors. I could only tell you from hearsay how it came to be marked out.

2428 Q. The Court: What Exhibit is that you are inquiring about.

Mr. Wells: That is Exhibit 10.

2429 Q. Judge Hines, had you personally any interest as an investment in the stock of Radio Station WOW Inc.?

A. Not the slightest.

2430 Q. Have you any understanding agreement or arrangement by which your friends, family or associates are to participate in any income from that station as operated by WOW Inc.?

A. None whatever.

[fol. 555] 2431 Q. Was it ever suggested to you that such arrangements could be made by which you or any other member of the Board should have any interest in it?

A. It was not.

2432 Q. Did you hear it discussed or ever mentioned, any intimation of that thing, until this suit was filed?

A. Absolutely not. I will say this, that in April, 1942, Mr. Bradshaw came through North Carolina and spoke at a meeting or two in that state, and at that time he had the radio station almost wholly on his mind in an effort to sell, and he told me it looked like the only way to get as much money as he wanted to get out of it would be to lease it, and he said at that time if he were not president of the Society and not engaged in the fraternal insurance business, that he might be interested in it because he thought it was a good thing, but he said "I just can't have and none of us can have a thing to do with it."

2433 Q. And you would have to get the organization on the outside?

A. Oh, yes.

Mr. Wells: That is all.

2434 Mr. Stewart: Do you have any cross-examination, Mr. Massey?

Mr. Massey: No, not right now; I may have some after you.

Mr. Stewart: Well, I think the regular order would be for Mr. Massey to examine him first.

[fol. 556] Mr. Massey: I am going to call him back as my own witness.

Mr. Stewart: All right.

Cross-examination.

By Mr. Stewart:

2435 Q. Mr. Hines, are you engaged in the general practice of law?

A. I am.

2436 Q. And you have been for thirty-five years, I believe you said?

A. Yes sir.

2437 Q. What duties are you required to perform as an officer of the Society?

A. As I testified on my direct examination I come here twice a year with the other members of the Board of Directors and we examine generally the affairs, canvass the reports of officers and business generally of the Society and make up reports to the Board of Directors.

2438 Q. Do you have directors meetings at that same time?

A. Frequently we do, not always; sometimes the Board of Directors meetings are shortly after that. Then I attend the Board of Directors meetings which are regularly, under the law, two meetings a year, and occasionally a special meeting, and of course, I attend meetings in my own state and other states near by from time to time. I am expected to look after legislative matters and investigate propositions occasionally for the Society, not often those—gener- [fol. 557] ally to do anything that asked to do in my territory.

2439 Q. About how much of your time is devoted to the assets of the business?

A. I have undertaken to estimate that. I think about one-fourth of my time now is required.

2440 Q. What compensation do you receive from the Society?

A. Thirty-six hundred dollars a year for being both a director and an auditor.

2441 Q. I believe you said you attended all board meetings?

A. I have attended every meeting since I have been on the Board.

2442 Q. You generally relied upon what Mr. Bradshaw told you concerning the radio station, didn't you?

A. I will say I relied upon what he did tell me as I relied upon what Mr. Ruess, Colonel Patterson and Mr. Newberry would tell me about it.

2443 Q. And you left it to Mr. Bradshaw pretty generally to determine whether the radio station would be disposed of?

A. I would say no as to that, that we determined generally whether it would be sold or disposed of; what he said had something to do with it, of course, but as to the policy of whether or not it would be sold, we determined that, and as to the details of the sale, those were left with him, as would have to be in most cases where you would have to treat with someone.

2444 Q. That is, you left to him, as I understand it, the determination of the terms upon which it would be disposed of?

[fol. 558] A. Many of the smaller terms.

2445 Q. Wasn't it also left to him, the question of whether it should be disposed of or not?

A. We did not; that certainly was not my understanding. We expected when we passed a resolution that he continue his efforts to effect a lease or sale or both, that he would undertake to carry out that resolution, in fact, the resolution reads that he continue his efforts to make a sale or lease or both.

2446 Q. Then as I understand it, the Board of Directors retained control over whether the station should be disposed of or not?

A. I think no, after that resolution.

2447 Q. Well, prior to that, up to that time?

A. No; my recollection is a resolution passed in February of 1941 authorized a sale.

2448 Q. You mean February, 1941 or 1942?

A. I believe it was as early as 1941. The resolution has been read—a motion has been read in evidence here; I would not be sure about the year, but I believe—well, I won't undertake to state the law, but I think it was the intention then to give power to effect a sale but not a lease, as I remember that resolution.

2449 Q. Well, prior to that time had the Board of Directors retained control of the question of whether the Society should dispose of the station?

A. Well, that calls for a conclusion but I would say yes, [fol. 559] that under the laws of most states it requires

action on the part of the Board of Directors to give general authority for the sale of an asset of that type.

2450 Q. In the resolution which the Board of Directors adopted unanimously on October 30, 1937, which reads as follows, Exhibit 5: "Be it resolved by this Board of Directors, that if, in the judgment of the president, concurred in by the Finance Committee, it should become advisable to sell or otherwise dispose of the radio station, full power is hereby vested in the president to make such disposition of the same as may be deemed advisable." Would not you say that that left it to the president rather than to the Board of Directors to determine whether to sell it?

A. Exactly; that is the resolution that I had in mind when I was talking about 1941 or 1942; I didn't think it was that far back.

2451 Q. This was October 30, 1937?

A. Yes, I would say, under that resolution.

2452 Q. It was left to the president?

A. A purchaser would be protected if he bought under that power.

2453 Q. Then again on March 5, 1942, in an executive session, this action was taken:

> "After much discussion of the subject Director R. E. Miller moved that the President be authorized to negotiate and make a sale of the property for the best price obtainable."

[fol. 560] And then after that it was still left to the president to determine?

A. I am under the impression that particular motion was made but not passed, but if passed it seems like it would give authority. Does the record show it was passed?

2454 Q. It says "Said motion was seconded by Director Braden and put and unanimously carried."

A. I was under the impression that that was the resolution that Mr. Bradshaw asked be withheld—maybe I am wrong about that. It was certainly our intention in the report our committee made and in the resolution that is attached to our report, to give full power to sell, lease or do both.

2455 Q. Now, you have a copy of the lease that was submitted to you as a member of the committee?

A. The memorandum of the first draft?

2456 Q. Yes.

A. I do not.

2457 Q. Were you furnished a copy of it?

A. Yes; that was part of the papers that we had when we had our meeting.

2458 Q. That was not attached to your report?

A. No; it was handed to the Secretary, as I remember it; at the time we made our report we returned the various papers we had; we had a number of papers, but it was not a part of the report.

2459 Q. Do you know where that lease is now?

A. No.

[fol. 561] 2460 Q. You haven't seen it since that day?

A. I have not.

2461 Q. Your recollection is that it was similar to the lease that was signed?

A. That is right; it had many identical provisions. We wrote a little memorandum in pencil, as I remember it. The lease had been designed to give us information, and had not been drawn for the purpose of having in it all the usual provisions about default and so forth.

2462 Q. You based the action which you took as a committee on the report which Bradshaw had made of the radio station at the meeting of the Board on August 25, 1942?

A. Yes; that was a part of what we based our report on. Of course, that report didn't say anything about price or terms. It was based on that report and the additional information which he gave us when we met with him.

2463 Q. Well, you didn't know what the price was: that hadn't been determined, had it?

A. My recollection is we knew the exact price at the time we drew that report and resolution and which turned out to be the same price at which it was sold.

2464 Q. Well, what was the reason then for putting in the report——(interrupted.)

Mr. Wells: That is argumentative.

A. "At such price and upon such terms"?

[fol. 562] 2465 Q. Yes, that the president be authorized to negotiate a lease that is satisfactory to him?

A. Because nobody had signed anything on the dotted line at that time; it was just still in the state of oral negotiations.

2466 Q. There is no price named in your report or in the resolution which you prepared, is there?

A. That is right.

2467 Q. No written record, is there?

A. No.

2468 Q. Of what the lease rental was to be?

A. Not so far as that report is concerned, because if it turned out those folks—Mr. Gillin, as I understand, then did not have all these men agreed finally to take their part of the stock; a great deal of what Mr. Bradshaw detailed to you happened after that meeting, but the price, as I remember, was identical with what was discussed in our meeting.

2469 Q. Do you recall being told who Mr. Gillin was then negotiating with?

A. I was told some of the names, yes. I remember Mr. Erickson as one, who did not eventually come in, I believe, and possibly Mr. Milliken. The other men I didn't know. I didn't know Mr. Erickson; I did know Mr. Milliken. The other names I would not remember very readily because I didn't know them.

2470 Q. Well, at that time you didn't know either whether the station was going to be leased or sold, did you?

[fol. 563] A. Yes; I think I can say we did, because the president reported to us that he had about exhausted his efforts to sell and that the lease idea seemed to be the way to get the largest price for the disposition of the station.

2471 Q. Your resolution, however, recites that he was authorized to negotiate a sale or lease, or a lease and sale?

A. That is the very reason it is drawn that way, because these negotiations were still more or less tentative, that is he hoped to get them through; they had not actually been consummated; as I say, they were even thinking about a limited partnership at that time. We saw papers of that kind which were not used.

2472 Q. Was that a limited partnership composed of Mr. Erickson, Mr. Swanson, Mr. Gillin and some other individuals, do you recall?

A. I wouldn't say that it was; I would not say that the names of the partners had been filled in—that, I do not remember.

2473 Q. The disposition of the radio station was never contained in any reports that you heard of from Mr. Bradshaw to the Sovereign Camp?

A. No; I don't recall anything; I don't recall any sale of any bonds or anything that was ever reported.

2474 Q. Did Mr. Bradshaw tell you that Mr. Guy Myers was to be one of the stockholders in the new company?

A. I would not say that he did or didn't. I do not [fol. 564] remember Mr. Myers name.

2475 Q. Do you recall whether he told you that the man who was putting in the most money in the new company was a New York broker endeavoring to acquire the power facilities here in Omaha for the Consumers Public Power District?

A. I didn't hear the Consumers Public Power Company mentioned, nor do I definitely remember Mr. Myers name.

2476 Q. Did he tell you that Mr. Matthews was going to be in the new company?

A. The name of Mr. Matthews sounds familiar to me, and it may have been mentioned on that occasion but, of course, I have known who Mr. Matthews is for sometime, and maybe I have heard his name in connection with something else.

2477 Q. Did he tell you that Mr. Matthews was attorney for the Consumers here in Omaha?

A. No; I didn't know that until this case here.

2478 Q. Did he tell you Mr. M. M. Meyers was to be one of the stockholders in the new company?

A. I said a bit ago that I didn't remember his name being mentioned.

2479 Q. Did he tell you that the World Herald had said it wanted to make an offer to purchase the station?

A. I don't remember hearing just that, but I remember Mr. Bradshaw telling me or us, I might say, probably the Board in session, otherwise the World Herald had made offers or gestures from time to time over the years. I know at a time when he was considering—early in the [fol. 565] spring of 1942, when he was trying to sell, that the World Herald was one of the prospects.

2480 Q. Well, do you recall that at the meeting along the last of August, 1942, whether Mr. Bradshaw then mentioned that the World Herald were interested in buying the station?

A. If they were interested at that time, I don't remember he reported that. My recollection is that the offer, if it was an offer, or the negotiations they had which were testified to this morning, came a little after that time.

2481 Q. Did you favor a sale of the station rather than a lease?

A. I would say yes, if we could get the same price for the sale rather than a lease because a lease leaves open some of the objections we have to an ownership. I would say that I favor a sale now subject to the lease, as quickly as possible, and that is what we intended by that resolution, that if a sale could be made after the lease was negotiated, we would dispose of it entirely.

2482 Q. Did you leave it to the president to determine at what price it should then be sold for?

A. Under that resolution, yes: Our price may have been discussed.

2483 Q. Do you recall what prices were discussed?

A. No, I don't.

2484 Q. I believe you said that you considered the lease desirable for the Society?

A. I do.

2485 Q. You have in mind, do you, that the Society's net [fol. 566] income from the station in 1942 was approximately $278,000, and that under this lease it will receive at most an average of approximately $74,000 a year?

A. Well, absolutely, I was familiar with all those figures.

2486 Q. And that that means a loss from that source of over $200,000 a year?

Mr. Wells: That is argumentative and does not take into consideration all of the hazards, and objected to as incompetent for that reason.

The Court: You may answer.

A. I would say we took all those matters into consideration; whether it would be a matter of loss or not would involve a number of elements. I had stock in a company that made $300,000 last year; you can buy that company for $600,000.

2487 Q. Do you consider that the Society has adequate security for the payment of the rent that will become due under the lease during its term?

A. I will say yes and explain: if we were lending money, I don't think we should lend money on that security, but this is not a loan; it is rent, and if the situation is anything like as good as is contended by the plaintiff here, or as good as we think it is, the pledge of the rents, the control over salaries, and the $100,000, the $75,000 capital

put up, does give a very good security for the rent, because if it isn't a good thing, why, of course, we wouldn't make the money ourselves if we kept it.

[fol. 567] 2488 Q. The provision in the lease that if the license to the station is canceled, the lessee may terminate the lease, do you consider that a provision that is favorable to the Society?

A. I would say it is not favorable ordinarily but fair; if I were the lessee I couldn't take it otherwise, and it may be, as a matter of law, if it was cancelled without fault of the lessee, it terminated the lease, but certainly if the Government takes over all radio stations as threatened, they certainly ought not to be compelled to continue to pay the rent.

2489 Q. If the license is canceled that puts the radio station back to the Society?

A. Yes.

2490 Q. What good would the radio station be if they couldn't operate it?

A. It might be some other lessee could get a license.

2491 Q. Other than being canceled from fault of lessee, but what value would it be to the Society if it received the station back without a license to operate it?

A. Oh, it would be very small.

2492 Q. Do you consider a provision in there that if the Government should take over the property that the lessee can then either continue to pay rent to the Society under the terms of the lease and keep any excess for itself—do you consider that fair to the Society?

A. I do, absolutely.

[fol. 568] 2493 Q. In other words, if the Government takes over on the basis of less than the rental, why, then the Society gets it back: that would be true, wouldn't it?

A. That is right. We get the rent we would have gotten otherwise.

2494 Q. And if the Government takes it over at a higher price then the lessee gets the benefit of that higher price?

A. Yes.

2495 Q. Again that gives the choice to the lessee rather than to the Society?

A. Yes; in making a lease contract you have to allow the other fellow something, you know, particularly when he is the fellow that is to pay the money.

2496 Q. Is there any provision in the lease that would prevent the lessee from withdrawing all of the capital of the company any time it wanted to?

A. I don't recall any such provision. I think you have laws in Nebraska that would take care of that.

2497 Q. What kind of a law?

Mr. Crossman: Equity.

A. I thought in Nebraska the capital of a corporation was a trust fund and had to be managed by whatever directors for the benefit of its creditors. That is the general law.

2498 Q. Well, we have a law in Nebraska that the capital stock of the company may be reduced with the consent of the stockholders: now, with such a law, couldn't the capital [fol. 569] stock be reduced to $100.00 from its present capital?

A. It is my understanding you can't do that without notice, giving the public notice.

2499 Q. In what way would the notice given make any difference?

A. Well then, the Society might in that way learn of that. I think you have provisions in there that the property must be kept up. I don't know that it says that the capital must remain unimpaired or not.

2500 Q. Well, that would have been a desirable provision to have in, would it not?

A. Yes, but it would not be very desirable from the standpoint of the lessee, because after a month or so the only income it would have would be the $25,000, would be the working capital, and there might be times when they would have poor income for a time.

2501 Q. Then as I understand it, the reason such a provision was not put in, would have to be because the lessee might find it necessary to withdraw its capital?

A. No, no; I am not talking about withdrawing; I am talking about the lease; we look to the keeping up of the property in good condition to give fairly good protection for us.

2502 Q. Well, the keeping up of the property would not require the company to keep its capital intact, would it?

A. Not necessarily.

2503 Q. Is there any provision in the lease that the earn-
[fol. 570] ings of the company or any part of the earnings of the company shall be retained by the company?

A. Now, you have a written instrument which speaks for itself. If you are asking me whether I recall such provision, I do not recall the provisions or any such provision as that.

2504 Q. Wouldn't you consider that a desirable provision, Mr. Hines?

A. That would be very fine. I have seen a lot of leases undertake to run the business of lessees; lessees generally won't sign leases of that kind.

2505 Q. Now, you said the reason that $25,000 of accounts receivable was transferred was so the new company would have working capital?

A. That is right.

2506 Q. That otherwise it would be without working capital?

A. Yes, and it would have its salaries and other expenses to pay, would have a large amount of insurance premiums to pay right off, early, of course, and President Bradshaw thought, always felt they should have $100,000 of working capital with a six or seven hundred thousand dollars a year turn-over.

2507 Q. Well, wouldn't the capital contributed by the stockholders be available for payment of expenses?

A. It would, but $100,000 was the amount that had been suggested as the total that they should have, and the $75,000 plus the $25,000 made the $100,000.

2508 Q. And you think that a favorable provision for
[fol. 571] the Society, to have the Society contribute $25,000 of that $100,000 of capital?

Mr. Crossman: Objected to as incompetent. Mr. Stewart says the Society contributed $25,000; that is contrary to every statement in his evidence.

Mr. Stewart: Well, use the word "transfer" instead of contribute.

Mr. Crossman: Leased.

Mr. Stewart: As I understand it, you consider it a lease of those accounts receivable?

Mr. Crossman: That is what the evidence shows.

2509 Q. Mr. Hines, do you understand the accounts receivable were merely leased to the new company?

A. The idea I have of this $25,000 is that it was merely transferred or the lessee was permitted to keep out of the collections $25,000 that was loaned or leased and was to be repaid in 180 monthly installments, which is added to the lease price. I may be wrong about that, but I think Mr. Gillin can tell you exactly how that it; but I think it is included in the lease price.

2510 Q. You spoke about Colonel Patterson and Mr. Newberry being opposed to retaining the station: how long had they taken that attitude, as you recall it?

A. Well, they have expressed no enthusiasm about it since I have been on the Board of Directors.

2511 Q. Well, have they expressed any opposition?

[fol. 572] A. Yes; for the last five years, I would say.

2512 Q. There is no record of that position in the records?

A. None that I know of.

2513 Q. How long has there been this threat of tax that you mentioned?

A. Oh, for about four years, I would think. I know when Senator Sheppard was still living—he has been dead two years—still living and on the Board, from time to time he mentioned the fact it was coming, and then these reports of the treasurer and the Ways and Means Committee made the threat more definite.

2514 Q. Did I understand you to say that the station did not create any good will in the southern states in the past ten years?

A. It just isn't heard down there—creates neither ill will or good will.

2515 Q. Now, are you referring just to the southeast or all of the southern states?

A. I would not know about all the southern states: I would say those states——(interrupted).

2516 Q. Over in your vicinity?

A. Where I visit, Virginia and North and South Carolina, Maryland, Georgia—that is about the only states where I have been recently.

2517 Q. I understand you to say when Mr. Bradshaw stopped at your home in 1942——(interrupted)

A. In North Carolina; not at my home.

2518 Q. In North Carolina—what was it he said?

[fol. 573] A. He told me about the negotiations up to that point, then he said it looked like he was not going to be able to get a satisfactory sale, like we were going to have to work out a lease.

2519 Q. And that he would take it himself if he were not in the Society?

A. That he thought it was a very good business, if he was not in the Society.

Mr. Stewart: That is all.

(Witness excused.)

2520 Mr. Crossman: Before we proceed with Mr. Mooney's testimony, let me present to Mr. Stewart what the reporter has marked Exhibit 30, which was presented to Mr. Bradshaw during his cross-examination. If you don't care to offer it, I will.

2521 Mr. Stewart: Well, we will look it over later.

2522 Mr. Crossman: Then I offer it in evidence as part of the cross-examination.

The Court: Received.

Exhibit 30 received in evidence, same being made a part of this record and being attached hereto as follows:

[fol. 574]

EXHIBIT "30"

Woodmen of the World Life Insurance Society

Statement of Receipts and Disbursements and Net Income of the Radio Account for the Period Beginning in 1923 and Ended December 31, 1935

Year	Receipts	Disbursements	Net Income
1923		$ 23,346.76	$ −23,346.76
1924	$ 3,449.09	14,385.98	−10,936.89
1925	7,421.44	16,422.62	− 9,001.18
1926	18,351.24	36,871.74	−18,520.50
1927	23,208.69	35,313.69	−12,105.00
1928	28,415.40	35,309.84	− 6,894.44
1929	65,985.23	44,247.15	21,738.08
1930	82,737.79	45,495.26	37,242.53
1931	94,224.55	57,424.18	36,800.37
1932	76,037.01	48,655.49	27,381.52
1933	72,149.86	64,793.51	7,356.35
1934	131,683.19	71,145.89	60,537.30
1935	167,590.55	168,762.59	− 1,172.04
	$771,254.04	$662,174.70	$109,079.34

[fol. 575] WILLIAM E. MOONEY, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crossman:

2523 Q. Will you state your full name, please?
A. William E. Mooney.
2524 Q. And your residence?
A. Chicago, Illinois.
2525 Q. And what is your address?
A. 9047 South Paulin Street.
2526 Q. What is your profession?
A. I am a lawyer and have been for over 31 years.
2527 Q. You maintain an office in Chicago?
A. I do.
2528 Q. And where is your office?
A. Number 1 North LaSalle Street.
2529 Q. Are you associated with any other persons in the practice?
A. Not now; I practice alone.
2530 Q. And you practiced law for thirty-one years in Chicago?
A. Yes sir.
2531 Q. Has your entire practice been in Chicago?
A. All the time in Chicago.
2532 Q. Will you tell us briefly when you first became associated with the Woodmen of the World Life Insurance Society and the various relationships that you have had with that Society up to the present time?
[fol. 576] A. In January 1912 I became a member of the Woodmen of the World Life Insurance Society in the local camp in Chicago, and from time to time thereafter I increased my protection in the Society until I had $20,000 worth of insurance in the Woodmen of the World. On September 30, I think, 1931, I became a director of the Woodmen of the World Life Insurance Society, and in March, 1935 I was promoted to be an auditor of the Board of Directors of the Society.
2533 Q. And have you continued as a director and as an auditor since you first assumed those offices?
A. Continuously since then.

2534 Q. Now, the auditors are officers but selected from the Board?

A. That is correct; they are a group of seven members of the Directors who are required by our by-laws to audit the accounts of the Society, making reports to the Board of Directors and specifically to make report in detail to the Sovereign Camps as they meet.

2535 Q. Now, is Judge Hines who just testified, an auditor?

A. He is.

2536 Q. And is Mr. Plunkett an auditor?

A. He is.

2537 Q. And Judge Braden who lives here in Omaha is an auditor?

A. He is an auditor.

2538 Q. And you are all members of the Board of Directors?

A. Yes sir.

2539 Q. When did you first hear, Mr. Mooney, concern- [fol. 577] ing the desirability of the disposition of Radio Station WOW in your official capacity as either auditor or director?

A. Well, shortly before this resolution was adopted in 1937.

2540 Q. Now, that is Exhibit 5. Will you proceed, please.

A. I had heard discussion of it at that time, but informally several of us on the Board of Directors had talked about some such program prior to the adoption of that resolution, that is, I mean some months prior to the adoption of that resolution.

2541 Q. Was there a discussion generally, without going into the details of , as to the desirability of either retaining or disposing of the station? Was that the general subject matter of the discussion?

A. The general subject matter of the discussion was the desirability of disposing of the station and as soon as practical, realizing that a radio station can't be sold every day.

2542 Q. From that time on, informally among the directors as well as officially in the Board meetings, has the disposition of this station been a subject matter of discussion?

A. It has almost every time the Board of Directors would meet, and prior to the Board meetings when the auditors would meet we would have informal discussions among

ourselves, sometimes, not often, with Mr. Bradshaw, but the general concensus of opinion practically every time we had a meeting, was toward the disposition of the radio station.

2543 Q. Now, did that continue from approximately 1937 down until disposition was made, generally?

[fol. 578] A. I should say that generally it did. There may have been some times when it was not discussed as much as other times, but if I remember correctly it was discussed practically every time we had a meeting.

2444 Q. Generally, did you have an opinion about this matter?

A. I did.

2545 Q. And generally, what was your opinion about either retaining or disposing of the radio station?

A. Well, prior to the time this resolution was presented in 1937, I had the feeling for a while that I might be the lone wolf on the Board of Directors about the disposition of the radio station, because I sensed, in talking to several other members of the Board—I don't recall who they are now—that I was the only one who was interested in seeing that this station was disposed of. But gradually, toward 1937, I found out that others of the Board of Directors had similar opinions to my own, and this resolution in 1937 was adopted unanimously, so that reflected the opinion of all the Board of Directors at that time.

2546 Q. Mr. Mooney, as to your own opinion with reference to the radio station, will you tell Judge Rine the reasons for your opinion, and as the reasons developed, what was the fact?

A. Part of the practice of my profession is taxation of insurance companies, Judge, and I have seen a growing tendency in the country, not only to tax insurance companies but to tax fraternal benefit Societies. There has [fol. 579] been a general tendency all over the country, not only in my own state of Illinois but all over the country we have it constantly in local societies. I was interested in the fraternal congress which was composed out of the 85 fraternal benefit societies in Illinois, and their general concern over taxation of their societies, many of them wondering how they could stay in existence if the same taxation was applied to them as was applied to life insurance companies operated for a profit. I had gradually built up a feeling in my mind as long as we retained

a business as profitable as this radio station was that there was no defense if we were taxed either Federally or locally, and I knew if the radio station was operated by the Woodmen of the World they would have to pay a tax locally on its receipts, regardless of the fact that it was being operated by a fraternal beneficiary Society. In addition to that, notwithstanding the fact that the radio station was operated at a profit and making a splendid showing, and I attributed most of that to the splendid management of President Bradshaw and Mr. Gillin and whoever they had associated with them, I felt the operation of the radio station was akin to running a theatrical proposition or a moving picture industry; it would become a liability on my hands if I permitted — to run too long a time. We were dependent entirely upon Mr. Bradshaw's operation and the work he was putting in on it; we were entirely dependent upon Mr. Gillin being successful continuously and in staying with us because a man who had [fol. 580] run a business as successfully as this radio had been run from 1932 on up, with the profits that had been in it, there would be enticing offers for him to go somewhere else. In addition to that, as time went on and as the war began we knew, of course, that the state legislatures would look around for everything that had not been taxed, and would endeavor to tax them, and as I said before, so far as the radio station was concerned, if they look at it carefully we were defenseless to taxation, we would have no further argument to defeat taxation as to profits of the radio station, and rather than wait until that took place I wanted to see the Woodmen of the World out of that business before that occurred.

2547 Q. Did you give any consideration, Mr. Mooney, in your opinion to the possibility of involving the taxation of all the income of the Woodmen of the World Life Insurance Society—I think maybe you have mentioned it—arising out of the operation of this station? Did you give any consideration to that in your opinion?

A. I did; that was the thing that was even more fearful, in my mind, than the question of just taxing the receipts of the radio station itself. That would be the end, if it were taxation of the radio station alone, that would not have convinced me about a sale of the station unless somebody came along and made an offer that no honest trustee

of the Society could reject, but when I noticed the his-
[fol. 581] tory of taxation of life insurance companies generally and saw how easily it was that the idea of taxing them was considered, it was just exactly like the Arab that permitted the camel to put his head inside the tent; the moment there was an entrance you were through, and all the rest of our societies would have been so imminent as to almost make it a requirement on us as directors of the Society to hand this station over just as fast as we could if we could avoid the taxing of the Society by reason of that fact.

2548 Q. In coming to a conclusion, did you have any opinion about the time required by the officers—I am not speaking of the ratio of time, but I mean in attention to these matters: did you have any information about that, and was that a factor taken into consideration in your opinion?

A. Well, that was a factor, but that would not be a major factor, but it would be one of the things that I considered in deciding we should dispose of the station, because I started on the Board of Officers of the Society in 1935. We would come to Omaha to audit the accounts, to question the securities, to check up all the assets in the vaults of the Society, and we would meet with President Bradshaw on the first morning of our visit to Omaha. That was for the purpose of giving him the benefit of our knowledge about the Society in our different parts of the country and knit up with him what he had known about that he hadn't communicated to us during the period before, and
[fol. 582] then to give us any particular instructions he might have as president of the Society as to just some particular things he might want to have audited more carefully than we had audited those particular things before, or something he might want to have examined into in a definite way. We would all be in there, all seven auditors would go in with President Bradshaw, the door would be closed, and we would hardly really get the conversation started as to what was occurring, for instance, in Georgia or Illinois with reference to meeting or something else with regard to members of the Woodmen of the World, before there would appear at the door one or two at least from the radio station, and this would happen every time. In addition to that then, we would have to wait while either President Bradshaw went outside to confer with them, which would take plenty of time and well eat into

the forenoon that we were getting ready to start our work on, or he would notify us to go out and wait until he had disposed of the radio station matter, and then when we would come back he would tell us what the matter was about, litigation, legislation, some serious matters that required the attention of the president of the Society to settle; it was not small matters; it was important matters.

Then as we would be meeting on the Board of Directors, for instance, I have been chairman of the President's Report Committee on several occasions, and the question of [fol. 583] refund to members would come up; I would confer with President Bradshaw so I would have first hand information as to whether we could make a refund in the first place, how much money we could refund to the members, and a lot of other things in connection with his report, would go to his office, but I could never have a connected conversation with him about matters that would involve a million or a million and a half dollars to the members without having Mr. Gillin or Mr. Ruess or some other of the members from the Radio Station come into the conference with something important. Don't misunderstand me, Your Honor, it was important to the Radio Station and I didn't resent it because the radio was part of our work, but before we could get back on the proposition of refunds or whether we were refunding a proper amount, or look over the figures again, it would take some time, because you can't interfere with a thing like this, get him into the radio business and then bring him back into the funds of the Society, what we should be doing about developing field work, or where we should arrange for our head camp meetings, things of that kind. You cannot bring a man's brain to that, back from one to the other in a moment, and I could see that the time of President Bradshaw was being frittered away—of course, frittered isn't the proper word because he was doing his work and his duty with regard to radio just as he was with the other but here was a radio business where they made $600,000 to a million dollars according to the way you look at it—[fol. 584] it was entitled by the assets of our Society to one-half of one percent of his time, and yet, from my own observation here a couple of months a year I could see he was giving it at least ten percent of his time that I observed, and other times it was considerably more. Now, with reference to Mr. Ruess, it was even more marked,

because Mr. Ruess was Chairman of our Board of Auditors, and when we came here to audit the accounts he was around as Chairman of the Auditors to be there and be present. Well, he wouldn't come in as early in the morning as the rest of us because he would be engaged in conference with Mr. Gillin and others in the radio department. He had more detail work to do in regard to the radio than Mr. Bradshaw did, and when he would come in the rest of us would be auditing all right but we were without direction, and there would not be any one of us that wanted to assume it. Several times I acted with Mr. Ruess as a team in checking our cash books, the cash accounts. I had to change that because Mr. Ruess couldn't give his time and attention to it because of this radio work, as he would otherwise, so the work of our auditors was somewhat unbalanced on different occasions.

2549 Q. Now, Mr. Mooney, I want to come right down to the report, Exhibit 9, which is in evidence, the report of August 31, 1942 which is a report of Charles A. Hines, William E. Mooney, Robert G. Plunkett and W. C. Braden: are you the William E. Mooney who joined in that report to the Board of Directors?

[fol. 585] A. I am.

2550 Q. Will you read it? (Handing Exhibit 9 to witness.)

A. You mean out loud?

2551 Q. No; to yourself. Do you need to read it?

A. (Witness examines Exhibit 9.)

2552 Q. Now, Exhibit 9 is a report with reference to the sale or lease or both of the Radio Station. Judge Hines has testified he is a lawyer—that is right?

A. Yes.

2553 Q. You are an attorney?

A. Yes.

2554 Q. Mr. Plunkett is an attorney?

A. Yes.

2555 Q. Mr. Braden is an attorney?

A. Mr. Braden is an attorney.

2556 Q. All directors?

A. Right.

2557 Q. Now, what information or what facts or what data did this committee have before it, including yourself,

at the time you reached a conclusion which you followed in this report Exhibit 9?

A. Well, we had a full showing in detail, the gross earnings, the expenses, the net earnings of the radio station over a long period of years; we had some data with reference to some other radio stations, although I don't recall just exactly what that was now. We had a tentative form [fol. 586] of lease with this new company or partnership—it was undetermined at that time just what they would be—and there was some other data in the file with which I am not familiar right now.

2558 Q. Did you confer with Mr. Bradshaw about the matter?

A. We did.

2559 Q. Did you meet alone about the matter?

A. Mr. Hines, Mr. Plunkett, Mr. Braden and I met alone in our auditors' room, and we spent all one afternoon and part of the next day considering these different things and going over just exactly what we should report to the Board of Directors.

2560 Q. Did you formulate your report, Exhibit 9, alone—this committee?

A. We did. Mr. Hines dictated it or wrote it himself in our presence.

2561 Q. Now, at the time you formulated the report, Exhibit 9, did you generally have before you figures as to what the Society might receive under then negotiations, either by way of sale or lease or disposition? In other words, did you have some detailed figures that showed you the progress of the then negotiations?

Mr. Stewart: Objected to as not the best evidence.

2562 The Court: The figures—what are they?

Mr. Crossman: I haven't asked him what they are; I asked him if he had some.

A. Yes; we did.

[fol. 587] 2563 Q. Have you examined the lease which was later entered into?

A. Yes.

2564 Q. Which is here, Exhibit 13?

A. Yes sir.

2565 Q. Were the figures generally before the committee when you made the report, Exhibit 9, very close to what is found in the lease, which is Exhibit 13?

Mr. Stewart: Objected to as calling for a conclusion and comparison with another written document which hasn't been produced.

Mr. Crossman: He hasn't said and nobody else has said that the figures he had were in a written document; nobody has said that.

Mr. Stewart: The figures were certainly written.

Mr. Crossman: Not necessarily; I asked him if he had before him figures; I didn't ask if they were in writing.

The Court: You may answer.

A. Yes, as far as I can see, they were exactly the figures that were in this Exhibit, the lease.

2566 Q. Mr. Mooney, as a director, speaking only for yourself, is it your opinion that the lease Exhibit 13, is a good deal for the Society?

A. Yes sir; I think it is a real good deal for the Society.

2567 Q. And what is your opinion as to whether or not, aside from any financial considerations which the Society [fol. 588] will receive from the lease, as to whether or not the Society is or is not better off to be rid of the operation of the radio station?

A. My opinion is that the Society is much better off having executed this lease than before, much better.

2568 Q. Mr. Mooney, Doctor Johnson, who has not yet been present in the court room so far as I know, the plaintiff, has charged under oath that these seven resident directors dominated you in getting your consent and vote to make the lease: what is the fact about that?

A. Your Honor, if anybody can dominate me, I would like to know it, because I have not been dominated in the Woodmen of the World and any one of these gentlemen will tell you that I have had my own independent ideas about things at different times, and I don't permit my temper sometimes to restrain my desire with soft speech, and that means no disrespect to any officer or director of the Woodmen of the World, but I just have independent ideas.

2569 Q. And you express them, do you?

A. Unfortunately I do too much.

2570 Q. Now, Mr. Mooney, I want to ask you one further question. While you have not specifically by name been charged with making a secret profit on this deal, as is so often found in this petition of Dr. Johnson's, it may be that you would be considered one of the associates or friends of

Mr. Bradshaw and the seven local people, so while you are here, before you go back to Chicago, I want to ask you [fol. 589] specifically so we will get that question settled. The petition charges, paragraph 9, that the individual defendants, that is, Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston, in violation of their duties as officers of the Society and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves and their friends and associates the possession and control of Radio Station WOW for a grossly inadequate consideration: now, what I want to ask you, Mr. Mooney, is, what interest, if any, do you have in the Radio Station WOW Inc.?

A. I do not have any.

2571 Q. Any stock interest?

A. None at all.

2572 Q. Any promise of any stock interest?

A. No sir.

2573 Q. Either in writing or orally?

A. In no way.

2574 Q. Either openly or secretly?

A. No sir, no interest.

2575 Q. Or any right to acquire any stock interest?

A. No sir.

2576 Q. You say then the charge as to you is not true?

A. It is certainly not true.

Mr. Crossman: That is all.

[fol. 590] Cross-examination.

By Mr. Stewart:

2577 Q. Mr. Mooney, how many meetings of the Board of Directors do you attend a year?

A. Well, we are required to have two, and I have attended regularly ever since I became a member of the Auditors.

2578 Q. Do you have more than two a year?

A. Not of the auditors.

2579 Q. How long do those meetings last, approximately?

A. Well, about two and one-half weeks each.

2580 Q. How many meetings of the Board of Directors do you ordinarily attend a year?

A. Well, we usually have two and there have been special meetings.

2581 Q. About how long do those meetings last?

A. Well, the Board of Directors usually last about a week. If it is a special meeting it wouldn't last that long, three or four days.

2582 Q. About how much time do you devote to your duties as auditor and director of the Society?

A. All together, back in Chicago, it takes about a third of my time; it is too much; I shouldn't devote that.

2583 Q. What do you do it for then?

A. Well, Mr. Counsel, I am a fraternalist. I started in the Woodmen of the World when I was a young boy, and being around Woodmen of the World meetings has gotten to be a sort of religion with me; a lot of people can't under- [fol. 591] stand it, but I am a fanatic about Woodmen of the World Societies; I attended approximately one hundred meetings last year—my wife is a Woodmen widow—I have been doing it so many years it should be charged up to my own amusement rather than work of the Society.

2584 Q. What do you receive as member of the Board of Auditors?

A. $3600.00.

2585 Q. Did you receive anything else last year from the Society?

A. I got $50.00 from an injunction suit in Chicago; it has already been consumed in court costs that I didn't charge the Society for.

2586 Q. Anything else?

A. No sir.

2587 Q. You get your expenses coming and going, of course?

A. I do; I certainly do.

2588 Q. Now, as I understand it, prior to 1937 you thought that the radio station should be disposed of?

A. I did, yes sir.

2589 Q. How long prior to that, is it?

A. Since I have been out here I have been trying to figure in my mind just how much it was; it probably went into the year 1937, probably in 1936, although it is hard to tell just when those things do come.

2590 Q. And when you came in October of 1937 you then discovered there were other members of the Board that [fol. 592] felt like you did, that the station should be disposed of?

A. No; I mentioned the others that were of similar mind before that, but at that time it was unanimous.

2591 Q. That it should be disposed of?

A. Yes.

2592 Q. Well, what did you do about it?

A. This resolution was adopted then.

2593 Q. What does the resolution do to dispose of it?

A. It gave him power to.

2594 Q. Did it direct him to dispose of it?

A. No; it gave him power to do it.

2595 Q. Did it make of him a request to dispose of it?

A. No; it didn't.

2596 Q. What have you done down to this day to see that it was disposed of?

A. Mr. Counseller, I am not an officer of the Society; I was acting as a director and expressing my view as a director, and that is the only thing I could do.

2597 Q. Well, is there any record here that you expressed yourself in 1937 as favoring the disposition of this station?

A. The members of the Board of Directors have known my opinion right from the start.

2598 Q. I am asking you if there is any record here showing you were in favor of disposition in 1937?

A. No.

[fol. 593] 2599 Q. Is there any record that shows you favored it in 1938?

A. If you mean written record?

2600 Q. That is what I mean?

A. I suppose there is not.

2601 Q. Or any in 1939?

A. No.

2602 Q. Any in 1940?

A. Now, Mr. Counsel, if you want to refer to the records of the Society, you can do that. There isn't anybody in Omaha that has ever talked about radio station in the Woodmen of the World Board of Directors that hasn't known that my opinion about this radio has been to sell it if we could get a fair price for it, since 1937.

2603 Q. There isn't a syllable of evidence in any of the records of the Board of Directors' meetings that have been produced here from 1937 up to 1942 that you favored the disposition of the radio station?

A. No, sir, because I don't stand up in the meetings of the Board and demand something like that.

2604 Q. You leave it to Mr. Bradshaw, don't you?

A. He knows what my opinion was and so do the other members of the Board of Directors.

2605 Q. And is there any record of any other member of the Board of Directors that they favored the disposition or sale of this radio station?

[fol. 594] A. No—I am not interested in the record.

2606 Q. I am; I want the record.

A. You ask me what I do and I will answer that, Mr. Counsel.

2607 Q. Can you point out any place in the record where you or any director went on record as favoring the disposal of the radio station from 1937 up to 1942?

A. No; I didn't think I had to go on record; I thought everybody knew I favored disposing of the radio station. There was no secrecy with me, Mr. Counsel, as to what I thought about the radio station and why.

2608 Q. Do you recall this resolution adopted October 30, 1937?

2609 Mr. Crossman: What exhibit is that, please?

Mr. Stewart: Exhibit 5.

2610 Q. (Continued:) "Be it resolved by this Board of Directors, that if, in the judgment of the President, concurred in by the Finance Committee, it should become advisable to sell or otherwise dispose of the radio station, full power is hereby vested in the President to make such disposition of the same as may be deemed advisable." You recall that resolution, do you?

A. Yes sir; I do.

2611 Q. Who offered it?

A. I did.

2612 Q. Not a word in there to request or directing the president to dispose of it, is there?

A. No, because there are a lot of things that would have [fol. 595] to be present in the sale of a radio station as large as that one, and we wouldn't want to tie the president's hands by resolution that might have to be changed and he might want to call us back to a special meeting of the Board, bringing Mr. Hines, for instance, from North Carolina and Mr. Holston from California, just because we had limited the thing to a certain restrictive phrase.

2613 Q. Was there any reason why you couldn't have offered at that time a resolution directing the president to

sell the station, if you thought that is what should be done?

A. For one reason, we didn't have any purchaser at that time, and you know, as between lawyers, what you might write in an agreement would be entirely different from something I might like. That was my composition, according to your likes it might not be adequate, but according to mine it was complete.

2614 Q. That is, a direction to the president to sell the radio might tie his hands so he couldn't sell it?

A. I cannot give you all the ideas I had in mind at the time; with the little feeble brain that I had, why, that was all I could work out.

2615 Q. Well, none of the other directors at that meeting could work out anything else indicating they wanted to dispose of the station either, could they?

A. They must have been satisfied with the resolution; it was adopted unanimously.

[fol. 596] 2616 Q. How long has this question of taxation been under discussion that you mention?

A. Well, it has been an accelerated proposition. It starts off gradually and as time goes on you can see the effects of taxation in the offing; you can see it approaching; it is just like an avalanche approaching.

2617 Q. When did you first see it?

A. In 1935 or 1936 when I first saw it as a threat, I didn't apply it, that it was a threat; I connected it up later.

2618 Q. Well, did you in 1935 apply it here?

A. I wouldn't say I did that early.

2619 Q. When did you, about?

A. Well, it probably was within a year of when this resolution was adopted, this 1937 resolution.

2620 Q. I believe you said you were afraid the taxing authorities might not only tax the income of the station but tax all of the income of the Society?

A. Yes sir.

2621 Q. And what did you do about that?

A. Well, I conferred with the other members of the Board and gave them the benefit of my notion on it.

2622 Q. Did you offer any resolution that the station be disposed of because of that danger or for any other reason?

A. Now, Mr. Counsel, the only two resolutions I know of are these in here, and the action of the Board taken in February, 1942. There is three specific times the Board of [fol. 597] Directors acted upon that. If you ask me about

anything else, I would say there wasn't anything, to my knowledge, presented before the Board.

2623 Q. Or did any other director, other than you, at any of the meetings that you attended, present any resolution to dispose of the station because of the tax threat or for any other reason, up to 1942?

A. I have already stated, I think, as clearly as I know how, that these were the three times there was action taken and report made, and I know of no other.

2624 Q. Now, you stated that the duties of Mr. Bradshaw as President of the Society and in connection with the radio station, interferred with your duties as auditors, that is, he would be interrupted in his meetings with you?

A. Well, I wish you wouldn't get it that way, because he was doing the work of the Society; I was insignificant; I certainly could wait; but my impression was that the radio was taking a very greater share of Mr. Bradshaw's and Mr. Ruess' time, and some of Mr. Newberry's, as I noticed, but not nearly so much, than the investment we had in it justified at all, and it would not only interfere with him but would interrupt him when he was doing things the Society needed done.

2625 Q. How long had that condition existed, Mr. Mooney?

A. Well, I noticed it when I became a member of the Board of Auditors in 1935. Prior to that I was only a director and would be here just a week at a time, was not the Chairman [fol. 598] of any committee and would not get to confer with the President as much as I did after I became an auditor and became chairman of committees on the Board.

2626 Q. But you didn't regard yourself as being in favor of disposing of the station for that reason?

A. Well, that would not be an impelling reason—if that was the only reason, Mr. Counsel, it would not be near as important, but along with other reasons—a man does not do things for one reason; he does it because of an accumulation of reasons—some things may be more important than others, but they all work together to force one to a conclusion.

2627 Q. Now, do you believe that the tax threat you mentioned has been eliminated by the lease of the radio station?

A. No, I don't think so entirely, but I think we are in much better position than we were when we owned and operated the station. Now, the station is paying taxes and will pay

some taxes, very substantial taxes, and naturally no taxing body can come along and do much to the net that comes to us on it.

2628 Q. Well, that is the income you are referring to?

A. Yes.

2629 Q. Well, what about this threat to tax the premiums of the company because you are making a profit out of the radio station? You are still making a profit aren't you?

A. Well, that would be a matter of argument between attorneys as to whether it is a profit. I don't think it is a profit.

[fol. 599] 2630 Q. What is it then?

A. Well, I will permit you to argue that out with Mr. Wells, but it is not in my opinion; it is not in my opinion; it is certainly a return on investment, in my opinion.

2631 Q. How much investment did the Society have in that station when it leased it?

A. I don't remember the figures at all.

2632 Q. Do you remember approximately?

A. No; I can't tell you off-hand.

2633 Q. Do you remember any time in recent years what the Society had invested in that station, approximately?

A. Well, that would be hard to tell from time to time because when we look over the figures there are so many charge-offs because of obsolete equipment and new equipment put in the station, unless you had the report right in front of you it would be impossible, a person wouldn't even guess on what he had read. I am not very good in remembering figures as large as that.

2634 Q. Well, do you think it would be as much as $200,000.00 when the lease was made?

A. I have no idea at all.

2635 Q. Now, I believe you stated that you were not dominated by Mr. Bradshaw or anyone else in connection with the company; so far at least as the disposition of the station was concerned you simply left it to Mr. Bradshaw to determine what disposition should be made of the station, is that right?

A. No; these resolutions speak for themselves, and the [fol. 600] action of the president in leasing the radio shows that he was following out the general mind of the Board of Directors as to what we wanted him to do. He certainly

was not exceeding his authority or doing something that none of us knew about.

2636 Q. No, perhaps not—that might be a question—but by the resolution commencing back in 1937 you left it to him to determine whether the station should be disposed of, didn't you?

A. Concurred in by the Finance Committee. You see we view the radio station—I don't know whether every director viewed it but several of us certainly did—as an investment, and as an investment the president and Finance Committee would have authority to consider it, or have authority to consider the sale or disposition of it.

2637 Q. Do you consider it a proper investment for the Society?

A. I don't think we could have invested $600,000—what I mean is, I don't think we could have taken the Society's funds and bought a radio station, but this was built up from nothing, and became an asset.

2638 Q. Well, you had to invest money in it over a period of years, didn't you, to develop it?

A. Yes; we did.

2639 Q. And then in 1942 you again left it to the president to make a sale of the property, if he desired?

A. Well, you see, we had net returns on the radio of a million dollars during the time that Mr. Bradshaw had devel- [fol. 601] oped it, and when a man can make a million dollars seemingly out of nothing, you can have a great deal of confidence in his ability to get results. I wouldn't care to put it in the hands of anyone else unless he can show a like performance.

2640 Q. Where is that million dollars you speak of?

A. Well, it is going into the Society's funds.

2641 Q. What security does the Society have for that million dollars?

A. Well, it has gone into the bank, Mr. Counsel, and has been used to pay claims.

2642 Q. Oh, you mean the earnings of the station?

A. Yes, the earnings of the station.

2643 Q. I thought you meant the value of the station. Now, you think the provisions of the lease are favorable to the Society?

A. I certainly do.

2644 Q. You consider the provision in the lease that gives to the lessee the option to terminate it in the event the license to the station is cancelled, a provision that is favorable to the Society?

A. That is a question that a person cannot fairly answer without an explanation. I do not see how anyone would take a lease of this kind as lessee without a provision like that. If I was drawing the lease for the Woodmen of the World, as attorney, I would put that in for the benefit of the lessee, even though I was representing the lessor, because I would feel that if the lessee looked at a lease I was drawing up without a provision like that in, he would think that I was [fol. 602] either dumb as a lawyer or trying to slip something over on them, because that is something that they should agree to anyway under a lease of this kind.

2645 Q. Well, isn't that putting the risk on the Society of the operation of the station?

A. The station would be worth little or nothing to us or the lessee if the license was canceled.

2646 Q. That is right. Now, if the license should be canceled tomorrow, the Society would receive two months rent from the station?

A. That is right.

2647 Q. And the lessee would cancel its obligation to pay the rent for fifteen years, and the Society would have a station of no value.

A. If you didn't have a provision like that and a lessee didn't require a provision like that in the lease, then we would have to guarantee the lessee its license would be kept in full force during the term of this lease, something we couldn't possibly do because under the law the Federal Communications Commission has a right to cancel the lease, and certainly there are provisions in the law where it has to be renewed at certain periods of time.

2648 Q. Then the Society was not trying to get rid of the hazard of the radio business by leasing the station?

A. I don't think your question can be answered, Mr. Counsel; I can't even explain an answer to the question.

2649 Q. Well, that was not one of the motives that induced [fol. 603] you as director to favor the disposition of the station, the fact that there was some hazard or risk connected with the operation of the station?

A. Well, there was, but that hadn't been an impelling

reason to me, because I felt that we could retain that license for a period of time, and certainly we had hoped that the lessee could.

2650 Q. And you believed that the operation of the station would continue profitable and that the lessee would be able to pay the rent?

A. I certainly hope that it will be profitable.

2651 Q. Yes, I know you hope to—do you believe it will be?

A. I certainly do.

2652 Q. And you did at the time you voted?

A. Yes, sir, and I do now.

Mr. Stewart: That is all.

Redirect examination.

By Mr. Crossman:

2653 Q. Mr. Mooney, what in your opinion as a director would be the position of the president of your Society if you, by resolution, commanded him to dispose of this radio station, insofar as his bargaining position would be concerned with a prospective purchaser or lessee—what in your opinion would his bargaining position be under those conditions?

Mr. Stewart: Objected to as incompetent and calling for [fol. 604] a conclusion.

The Court: He may answer.

A. The president would be in a much better position to bargain than before. Of course, he would have to make a quick deal or get the Board to change his resolution.

2654 Q. Well, his hands would be tied, wouldn't they?

A. They certainly would.

Mr. Crossman: That is all.

Recross-examination.

By Mr. Stewart:

2655 Q. Well, the president had from 1937 up to 1942 to dispose of this station, didn't he?

A. With the consent of the Finance Committee, I suppose he could.

Mr. Stewart: That is all.

(Witness excused.)

(Thereupon an adjournment was taken until 9:30 A. M. March 5, 1943.)

[fol. 605] 9:30 o'clock A. M., March 5, 1943.

DE E. BRADSHAW resumed the witness stand, and testified further as follows:

Cross-examination continued.

By Mr. Stewart:

2656 Q. Mr. Bradshaw, I understood you to say——(interrupted)

A. Pardon me. I would like to have a statement corrected. In my testimony yesterday I stated, in comparison, that a week was a tenth of a year. There are fifty-two weeks in a year, and therefore a week is only one fifty-second of a year, and five weeks would be a tenth of a year—five and two-tenths. And I desire to make that statement, plus one other: I said that in my original deposition, I believe, as I remember it at least, that I presumed or thought that I gave at least one-tenth of my actual time to the radio business, and I want now to repeat that as being a true statement, except as to the last year when I did give, I think, quite a little more than that. That is all. Thank you.

2657 Q. Well, Mr. Bradshaw, instead of saying that you gave at least ten per cent of your time to the radio business, didn't you say that you don't think it would take more than ten per cent of your time?

A. I think probably I said that, yes.

2658 Q. I understood you yesterday to say that the radio station lost money every year up to the time that you be-[fol. 606] came president of the Society.

A. Yes.

2659 Q. There have been figures submitted here by Mr. Pakes, assistant secretary of the company, that shows the net income of the Society——(interrupted)

Mr. Crossman: What exhibit?

2660 Q. (Continuing) —from the radio station, Exhibit No. 30, from 1923 to 1935, inclusive.

A. Yes.

2661 Q. As I understand it, you became the president in November of 1932?

A. Correct.

2662 Q. And this statement shows that in 1929 the station made $21,000?

A. Yes.

2663 Q. In 1930, $37,000?

A. Yes.

2664 Q. In 1931, $36,000?

A. Yes.

2665 Q. And in 1932, $27,000?

A. Yes.

2666 Q. You haven't any doubt about the accuracy of those figures, have you, Mr. Bradshaw?

A. I haven't any doubt about the accuracy of the figures on the books, but I do state that this is not a correct statement of the expenses of the radio station. They had over [fol. 607] 5,000 square feet up there that they did not have any right to in that other building that we had, that they were not charged five cents for during that time. In addition to that, Mr. Stiles' salary, who was our general field man, devoted nearly all of his time to this, and no part of his salary was charged up against it. In addition to that, the radio mail would come in there sometimes as high as forty thousand letters a week, and he would put thirty girls doing that work on that stuff, working through it for a good, long time, using these girls, answering these letters, using all the stationery for which nothing was charged, all the stamps that were used for that, and everything, and then they had an exhibit, people coming in there to show them the station, none of that was charged against the radio, and therefore I say that the radio station had not made a dollar until I came.

2667 Q. What was the reason for not having the books of the company accurately reflect the earnings of the radio station?

A. Well, Mr. Fraser is not here, he was president at that time, and I would—I don't believe I could answer that question. But when I got in charge and entered on the work, every item that was an expense to the radio was charged against the receipts from the radio.

2668 Q. And it continued then to show a profit up until the year 1935, when, I believe you said, you installed about $150,000 of equipment and charged that against the radio income?

A. Well, it continued to show a profit, but I installed a lot [fol. 608] more equipment than $150,000.

2669 Q. What was the total amount?

A. The amount that we spent was $169,000 on equipment.

2670 Q. Did I understand you to say yesterday that if the Society received the net income from the station of $250,000 a year, and that income was taxed to the Society on the same basis as any other corporation, that the Society would only have $152,000 left of that net income?

A. I said that there was a difference between the accountants and tax experts on that matter, and a difference between me and them as to the amount which it would make. Since it is—it is on the books of the corporation at nothing, and has no value at all. All of the property could be called excess profit earnings. But I said that since forty per cent came out first, anyhow, that would be $100,000, and then there is ninety per cent of the other, and under the original bill ninety-five per cent—which didn't pass—ninety per cent of that would go; that would only leave $15,000. Now, that is the statement I made.

Now, there is an opportunity, perhaps, to get a credit for some capital account. I don't know how you can get it when you haven't it on your books for a dollar. I don't know how you can get it. Maybe a tax expert can work it out, but I cannot. I am just taking the figures as they are.

2671 Q. Well, I still don't understand, Mr. Bradshaw. You say the tax on the first $100,000 would be forty per cent?

[fol. 609] A. No, I didn't say that at all, or intimate it.

2672 Q. You said it would be forty per cent?

A. I said the tax at the time is forty per cent that is charged against the corporation. It is twenty-four, sixteen; that is the first tax that is charged against the corporate earnings. That is forty per cent. And then the balance is excess profit tax against which there is now, according to law, a charge of ninety per cent.

2673 Q. Well, what would the forty per cent apply on?

A. The net earnings, the $250,000.

2674 Q. The $250,000?

A. The $250,000. That is after—that is net after all other taxes and everything is paid.

2675 Q. That would be $100,000 then, wouldn't it?

A. That would be $100,000.

2676 Q. And then to what would the ninety per cent apply?

A. To the remainder, the $150,000 that was left.

2677 Q. As I understand it, you made no effort to dispose of the station between 1936 and the beginning of 1942?

A. That is, as you understand.

2678 Q. Yes; am I right about that?

A. I haven't made any statement of that kind.

2679 Q. Is that a fact?

A. No, it is not a fact. From 1936 on we were—I was feeling around to find out what—more particularly to find out what it was worth, its value, than any effort to dispose [fol. 610] of the station. But from 1937 on, after the Board of Directors were rather anxious to get rid of it, I did make efforts to dispose of it. It is not an easy matter, often, you know, to get folks into the idea of buying in something they don't know anything about, which is as uncertain as the radio business.

2680 Q. Mr. Bradshaw, your deposition was taken in this case, wasn't it?

A. Yes.

2681 Q. When that deposition was taken were you not asked this question, at the bottom of Page 9 of the deposition—Page 10: "Well, were there negotiations and efforts to sell the station between 1936 and this transaction a year ago?" And did you not answer to that question: "No, not that I recall"?

A. Well, I probably said that, but that was with reference to definite groups of gentlemen that I was trying to negotiate a sale with. I was discussing it and looking for someone who would buy it, but not so insistent as I had been during 1941 and 1942.

2682 Q. But this question was asked, whether there were negotiations and efforts to sell the station between 1936 and the transaction about a year ago, and you stated then that there were none that you recalled?

A. And I have no doubt that is exactly what I said, but I was referring then to the fact of definite outstanding efforts to get out and hunt folks to make it—to make a deal;

[fol. 611] that is, casually or as the opportunity offered I was seeking a plan to sell the station, but not the overt acts that took place later.

2683 Q. You stated yesterday that the station reaches only a small per cent of the members of the Society.

A. I did.

2684 Q. Over what states does the radio reach the members of your Society?

A. Well, I haven't got the map of the coverage here, but would you let me have that to use as a basis?

Mr. Massey: (Hands paper to witness.)

A. (Continuing) I have before me what is called a field intensity survey, and that shows—and which I happen to know is true—I have part of Iowa, a little of South Dakota, Nebraska out more or less 190 miles.

2685 The Court: From where?

The Witness: West.

2686 The Court: From Omaha?

The Witness: Yes, from there; and continues south as much as 220 miles into Kansas, and a little in the northwest corner of Missouri, and over in Iowa, about half way, a little over, the greatest extent 190 miles, I suppose; in all that territory we have scarcely any members. We have a little in Minnesota, practically no members in South Dakota. Of the number of members that we have in Nebraska, as shown on the books as members of Nebraska, a great many live away from here, and they are Camps that have gone [fol. 612] into default, and we had to take over the membership from there and carry them from the home office. And we have very little business in Kansas, and very little business in northeast Missouri, and very little business in Iowa.

2687 Q. How long has that situation existed that is reflected by your testimony?

A. Well, I would say that from—it began as early as 1930 to be cut down by other stations coming in and limiting the area, and, of course, it has increased as the years have gone, each year has brought a new station or group of stations, or kilocycles that cut us down, cut the field intensity down. Of course, there are plenty of people in the radio business that would say that that map is rather a large map, used for advertising purposes.

2688 Q. Well, how long has the area coverage of the station been limited to the states that you have mentioned?

A. Well, I would say at least for five or six years, or more. I will give you the exact membership in all of those states if you will give me a little more time.

2689 Q. No, I don't care for it.

A. I don't suppose—out of 337,000 I don't suppose it would run over—I don't think it would be 20,000 in all of them, taking all the states.

2690 Q. That does not take in Illinois?

A. No.

[fol. 613] 2691 Q. Or Wisconsin?

A. No, we have not.

2692 Q. Or Arkansas?

A. No.

2693 Q. Or Oklahoma?

A. It is not 150 miles to Oklahoma.

2694 Q. Mr. Bradshaw, I want to call your attention to an extract from your report to the Board of Directors made in 1938, Exhibit No. 19, which reads as follows: "Radio Station WOW, operated by our Society, continues to be a valuable medium of keeping our Society in the public eye over a very extensive area. At least once each day an announcement is made calling attention to the Society with pertinent facts of its aims and accomplishments. In the 'News Tower', its monthly bulletin which now has a circulation of approximately 10,000, attention is directed to the Society by timely items.

"Daily we make short advertising announcements concerning the Woodmen Of The World Life Insurance Society, and our territory of coverage is so great that we, in this respect, reach a number of states such as Arkansas, Oklahoma, Missouri, Kansas, Illinois, Iowa, Nebraska, South Dakota, Minnesota and Wisconsin."

Now, was that statement correct, Mr. Bradshaw?

A. It was.

2695 Q. When you made it?

A. That was. But I think I might be entitled to this expression, that we can hear a station, for instance, in [fol. 614] Arkansas, get out this side of Little Rock forty or fifty miles, you can on a clear day tune in this station and hear it practically all the way in, but it is not in use—people use their local stations, they don't try to get those stations that are far away, and it is not such that it comes

in, anyhow, and can be heard by them. This is a representation, a fair representation, rather liberal, on all coverages. I am referring to the field intensity survey.

2696 The Court: Whom was that made by?

The Witness: I presume this was made by the station. It was signed by—I see "Radio Station WOW" on it. I presume that Mr. Gillin and his sound engineers have gotten this up. That is a presumption, of course, your Honor.

2697 Q. Well, in 1938 you considered your territory, the coverage of the station, so great as to include all of those stations that I enumerated?

A. Well, you heard what I said just now, my testimony in answering your question. Now, that is what I mean, and that is what I said.

2698 Q. Then do I understand you attempted to distinguish between your territory of coverage and some other means of describing the persons that are reached by the station?

A. There are rare instances where people can in Arkansas, and I presume in some places in Texas and other places can get the station certainly after midnight when [fol. 615] other stations are off, but that is not the coverage. But do you think I would write a story about the radio and put it in the report there that when we have a property of that kind, that I would not make it just as favorable as my conscience would probably let me make it to show how extensive it was?

2699 Q. Yes. And then when you testify in court you make it as unfavorable to show the extreme coverage, is that correct?

A. No, it is not correct, and it is not a fair conclusion from the statements I have made.

2700 Q. Isn't it a fact that you now have testified here in court to the coverage of only a few .ates, whereas in this report you give a coverage in a large number of states?

A. Well, I don't care to argue with you. My statement is before the Court, and he can determine that.

2701 Q. I believe you testified yesterday that you never offered to give verbally, or any other kind of option to the purchaser of the station, to a prospective lessee.

A. You mean that I would give them an option to purchase the remainder interest in the station?

2702 Q. Yes.

A. No, I never gave any option of that kind. I stated yesterday—you asked me about Mr. Swanson.

2703 Q. Yes.

A. Yes. Now, I think Mr. Swanson may have testified that I told him that, and he no doubt thought so if he did, and there is no question about that, but I explained that [fol. 616] to Mr. Swanson, as I told you yesterday, that I could not do that and would not do it. I could not do it because it would immediately make a sale out of the station instead of a lease, and they could not afford to take it and I could not afford to give it.

2704 Q. Well, wasn't that the reason why you told him that he could just take your verbal assurance on the option and not put it in the lease where it would be seen?

A. Well, I told him it was my idea to dispose of the remainder interest in the station, and that I would dispose of it at a fair and reasonable price. A discussion was had about whether it would be worth twenty-five or fifty thousand dollars, or what amount, and I said, "It will be reasonable, whatever amount it is." But they could not purchase the station until the end of the lease.

2705 Q. You did not tell him that you would give him a verbal option so that it would not have to show in the lease, where it might jeopardize the income that they would have?

A. Let us get that answered once and for all times. No.

2706 Q. I want to call your attention to the testimony of Gilbert Swanson, found in his deposition and filed in this court, taken in this case, where he says on Page 21, Question 98—(Interrupted).

Mr. Wells: We object to that; that has not been introduced in evidence.

Mr. Crossman: Cannot impeach Mr. Bradshaw's testi- [fol. 617] mony with Mr. Gilbert Swanson.

2707 Mr. Stewart: Well, I am going to give him an opportunity while he is on the stand to say whether this is correct.

2708 Mr. Wells: Mr. Bradshaw has been talking about Carl Swanson, and he is undertaking to offer Mr. Gilbert Swanson's deposition, which is not in the record in this case at this time.

Mr. Crossman: Cannot impeach him.

Mr. Stewart: I did not limit it to Carl Swanson. I asked him whether he gave any such option to any prospective lessee.

The Court: You may inquire.

2709 Q. (Continuing) Question 98, addressed to Gilbert C. Swanson, and the question is, by Mr. Wells: "Did you and your associates afterwards negotiate a contemplated lease? A. Yes. After that was out we started talking along the lines of a lease, a rental arrangement, with the further thought in mind that after the period of this lease rental arrangement we then would have a clause in our contract giving us the option of the purchase of the station at $50,000; if the lease would run, I think it was for fifteen years, we would have the option of buying that for $50,000, until we found out it would not be acceptable to the Internal Revenue Department to be called a lease if we had the purchase agreement in it, so that went out the windows." [fol. 618] Now, is there anything in that statement, or answer of Mr. Swanson's, with which you disagree, Mr. Bradshaw?

Mr. Wells: I object to that because of the fact that Mr. Bradshaw is not in it; he doesn't testify that Mr. Bradshaw said anything.

Mr. Stewart: I will show whom the negotiations were with.

Mr. Wells: I am talking about that now.

The Court: Let him answer.

A. Your question is: Is that true or false, or what? He could tell me just what the last of the question is.

2710 Q. Whether there is anything in that answer of Mr. Swanson's that is not according to your recollection of the negotiations.

A. Most of all he says there is exactly in accordance with my recollection, and in accordance with the facts, and as I said a moment ago, that we had discussed there a question of the value of the remainder, mentioned twenty-five and fifty thousand dollars, but I had told him that I would not enter into any kind of an agreement with reference to letting him have an option for any price.

2711 Q. Well, you say most of that is correct. Is there anything in that answer that is not correct, so far as you recollect?

A. I tried to modify it by my previous statement.

2712 Q. Well, is there anything in it that is not correct? If there is, point it out.

[fol. 619] A. I said that it was—may I put it this way? I say that it is correct with reference to his declaration there about the tax trouble, that they could not have an option, and they could not agree to an option either in the lease or anywhere else, and what we had talked about with reference to the twenty-five or fifty thousand dollar value of the property, estimated or suggested it might be worth that. No definite amount was ever stated that anybody could get the option for any amount, to take the property at the end of the lease.

Now, in as far as my statement there contradicts that statement, my statement here is correct.

2713 Q. And otherwise the answer is correct?

A. All right, yes, it is.

2714 Q. States the fact. Then I want to call your attention to this question and answer of Gilbert Swanson, Question 150: "I understood you to say you didn't want to take the lease without the option to purchase at the end of the lease; is that right? A. That is right. Q. How did that affect the transaction from your standpoint? A. Well, if the option to purchase were put in the deed that then it would be considered, the lease would be considered a purchase arrangement rather than a lease arrangement, and the Internal Revenue Department wouldn't okeh the deal —they might consider that the payments, the monthly payments were in part for the purchase price." Is there anything in that?

A. That is one hundred per cent correct.

[fol. 620] 2715 Q. "Question 152: Rather than as a payment for the use of the property? A. That is right. Q. And therefore not be deductible items of expense, is that right? A. Yes, that is right." Now, is that correct so far?

A. Yes, that is correct, both as to the fact and as to the law.

2716 Q. "Question 154: As I understand it, Mr. P shaw said he would be willing to give his word to you and your associates that the new company should have that option. A. Yes; he indicated that." Is that correct?

A. Well, they may have taken it as a fact that I had indi-

cated it—indicated what; what was it which said I indicated it?

2717 Q. I will read it again: "Question 154: As I understand it, Mr. Bradshaw said he would be willing to give his word to you and your associates that the new company should have that option. A. Yes; he indicated that."

A. Yes, I indicated that; I told them that I would be willing to dispose of it, but I understand you are trying to make a point as to an amount that I agreed upon.

2718 Q. No.

A. No. If you are trying to do that, then there was no agreement there at any time, or any statement made about the amount which I would accept or which I would agree to.

2719 Q. Then you do now state that you did offer to give the Swansons verbal option to purchase the station?

A. No. I stated quite the contrary; that I said I would [fol. 621] set a value and I would be reasonable about it, whatever it would be if they bought it.

2720 Mr. Crossman: Just to correct the record about the statements made, Mr. Stewart rather left the impression that Mr. Wells was asking those questions.

2721 Mr. Wells: I asked the first question. I did not ask the rest of the questions. Let the record show that.

2722 Mr. Stewart: That is correct. I only said that you asked the first question.

2723 Mr. Crossman: You did not change it. You didn't change the record where you asked the questions. Now, if you are going to put it in, put it in right when you ask it.

Mr. Stewart: All right.

2724 Q. Then this question was asked of Mr. Swanson by me: "Question 154: As I understand it, Mr. Bradshaw said he would be willing to give his word to you and your associates that the new company should have that option. A. Yes; he indicated that." Now, I understand that is correct?

Mr. Wells: I object to that.

A. I wonder if you are trying to hook up an amount with that.

Mr. Crossman: Wait a minute, Mr. Bradshaw. You asked that and Mr. Bradshaw said yes.

Mr. Stewart: You raised a question about it.

Mr. Crossman: He answered that question. Now, you are asking him again the same question.

[fol. 622] 2725 Mr. Stewart: You raised a question that I had not shown that I asked the question. If that makes any difference, I want to give him a chance to answer it.

2726 Mr. Crossman: It wouldn't change the situation, would it?

2727 Mr. Stewart: Why did you raise the question?

2728 Mr. Crossman: Because you didn't show who asked the question.

2729 Mr. Stewart: What difference does it make as to who asked him the question?

2730 Mr. Wells: None whatever.

2731 Mr. Stewart: If he made the statement.

2732 Mr. Wells: None whatever.

2733 Mr. Stewart: Then why bring it up?

(Question read.)

A. Well, let's put it another way; maybe it would be more understandable as relating a fact. I don't know what that question is, but I would not have sold the property, the reversionary interest, to any other person during the period without giving the Swansons an opportunity to have purchased it, and that much is clear, I would not have disposed of the property, it was not in my mind to do it, and I would not have done it. I probably said that to him, but I don't remember. But then to give him an option to buy the property at the end of the time for $25,000 or $50,000 or any other sum, I never did. That is what I am telling you. He may have understood that I [fol. 623] would do it, but he certainly does not understand any definite price, because I—we did discuss it, and they said, "What would it be worth, $25,000 or would it be worth $50,000, or what?" And I said, "I don't know. But whatever it is worth, we will be reasonable about it."

2734 Q. Well, you have forgotten the fact that the previous question which I read, and the answer of Swanson said that it was an option of buying for $50,000.

A. Well, there wasn't any option made of that kind at all with Swanson or anybody else, or any amount mentioned or any amount stated. The amount was discussed, I will admit that.

2735 Q. Then I asked this question of Mr. Swanson: "Question 155: But because of the uncertainty of Mr.

Bradshaw being here when the time came for you to exercise the option, you were unwilling to accept it? A. That is right.'' Is there anything in that statement?

A. Well, that is what motivated him and caused him to reach his conclusion.

2736 Mr. Wells: Now, if your Honor please, I desire to move to strike from the record the cross examination by Mr. Stewart yesterday, all the questions that Mr. Stewart propounded to him and the answers that were made in reference to the Folts case that he referred to, and also about Mr. Bradshaw just having returned from Florida, having been in Florida a couple of months this year and last year, for the reason that in the Folts case Mr. Brad-
[fol. 624] shaw was not a party plaintiff or defendant, nor even attorney of record in the case, nor a member of the Board of Directors; was only general counsel for the Woodmen of the World previous to the institution and at the time of the pendency of this action. And to my mind, if your Honor please, the allegation in the complaint is indicated to cast aspersions about Mr. Bradshaw as an attorney of the Woodmen of the World at that time, because of the charge of fraud in that case, to which he was not a party, and I think it is unprofessional and unethical to introduce that in this action.

And the second reason, about the Florida case, that is purely a personal matter; it could not enter into this case.

The Court: No; I think I will leave it in. I am not passing on the materiality of it or anything else.

Redirect examination.

By Mr. Wells:

2737 Q. Mr. Bradshaw, why were you in Florida two months this year and two months last year?

A. My doctor advised me to be in Florida or some place where the ground was level and there were not such cold winds as there are here.

[fol. 625] 2738 Q. For what reason?

A. Well, I had had an illness and he thought it was unsafe for me to remain in this climate under those conditions.

2739 Q. Have you any objection to telling what the illness was?

A. Oh, no. I had coronary thrombosis about four years ago, and was confined to the room for about sixty days, and the doctor was of the opinion that I should have a certain amount of exercise, and could take quite a bit of exercise, so that I could preserve myself, but I could not walk up inclines and I could not walk facing cold winds. He advised me—he didn't say why, but that is said to be the most dangerous thing that one having a heart trouble could do, and it was for that reason that I went to Florida, and then I went at the instance and request of the Board of Directors, for that matter.

2740 Q. While you were in Florida this year and last, or at any other time, did you discharge your duties as president of this Society in looking after its affairs and the finances of this Society?

A. I think so. I have an office there in which I conduct the business. Of course, a lot of our business is by telephone, and, of course, it can be done there as well as it can be here. I did the best I could, and I had to have good health, except when I went down there, and got down there on the 1st of January of this year, and they took me to the hospital with pneumonia, and they kept me in there for a [fol. 626] while. I just got out, but in two weeks I was in the office, was going as usual, so I think it was fortunate that I had the strength that I had developed by reason of my exercise here and there.

2741 Q. Mr. Bradshaw, I desire to ask you: Do you remember the case of William B. Price, appellee, v. William A. Fraser, and others, appellants, instituted in the Douglas County District Court?

Mr. Stewart: That is objected to as immaterial and not bearing on any issue in this case, and self-serving.

The Court: You may answer.

A. I remember the suit that was brought, yes, against Mr. Fraser. That was about the sale of the building down here, wasn't it?

2742 Q. Yes, sir.

A. Yes, I remember that suit. It was brought against me, too, I think.

2743 Q. No, sir.

A. Wasn't I a party to that suit?

2744 Q. The Court: He is inquiring about the Folts suit?

2745 Mr. Wells: No.

2746 Mr. Stewart: Asking about another case, Judge.

2747 Mr. Wells: I am talking about the case of William B. rice against William A. Fraser, John T. Yates, De E. radshaw.

The Witness: Yes, that was a suit brought by W. B. Price fol. 627] to set aside the sale of the building down on 14th treet.

2748 Q. That is right.

A. We had sold the building there for $1,600,000, and iat suit was brought by Price as a member to set aside iat sale after it had been accomplished.

2749 Q. Do you recall what the charges were in that peti- on as grounds to set the sale aside for that building?

Mr. Stewart: That is objected to as incompetent, irrele- ant, immaterial, not proper redirect examination, not tend- ig to prove or disprove any issue in this case, and self- erving.

2750 The Court: You might want to clear it up as to hether it was the same one or not.

Mr. Stewart: It was not.

2751 The Court: I say, he will probably show it is not the ame case that he referred to, and it has not been shown.

Mr. Wells: Not the same case.

The Court: You can answer the question.

A. Yes, I recall what they were.

2752 Q. What were they?

Mr. Stewart: That is objected to as not the best evidence, id immaterial.

The Court: You may answer.

A. They were almost identical with the petition here fol. 628] charged, in that instance.

2753 Q. Mr. Price charged that it was inadequate?

The Court: About the same, he said.

2754 Q. Oh, about the same?

A. About the same as here, with this change: The peti- ion, however, was against Fraser and some others, instead f the parties that are mentioned here, and charged that he building was sold at a grossly inadequate price, and I hink if charged substantially that Fraser and I had gotten million dollars out of it.

2755 Q. Profit and benefit in that transaction?

A. Yes, profit and benefit, and made a lot of money out of it, and all that kind of business, principally fraud in disposing of it.

2756 Q. Was Mr. Donald W. Stewart the attorney for the plaintiff in that case, the same Donald W. Stewart the attorney for the plaintiff in this case?

A. You mean that this Mr. Stewart, was he the attorney in that case?

2757 Q. Yes.

A. I think he was.

2758 Q. Now, Mr. Bradshaw, do you know what the bonds that were issued on that building, under that sale by the purchasing company, sell for on the market today?

Mr. Stewart: That is objected to as immaterial, and not proper redirect examination, and going into the question [fol. 629] of another case. If they are trying to establish that they acted in good faith in another transaction, that does not change the fact that the Supreme Court in the Folts against Globe Life case said they did not act in good faith, and it would be certainly self-serving.

2759 Mr. Crossman: Why did you mention the Folts case?

2760 Mr. Wells: That is what I say, he introduced the Folts case, in which there was bad faith on the part of the officers of the Society; in the Folts case, why, they are not the same defendants, except for Patterson and Bradshaw, not a party to it, and indicating because he was attorney that he was a participant in the fraud in that case as he charges, and this case Mr. Bradshaw was a party to the action, and the Supreme Court exonerated him in full. Mr. Bradshaw was an attorney for the Society at the time of the Folts case, but the officers are not the same, except Colonel Patterson; a new Board entirely. And Bradshaw was a defendant in this case.

2761 Mr. Stewart: That is entirely argumentative, and the facts are that Mr. Bradshaw, himself, made a statement on direct examination that he had never participated in anything to the detriment of the Society. Now, on cross examination I am showing that he was the attorney for the Society at the time of the Globe Life case, and to show that it was a part of his duties to consult with and advise the [fol. 630] officers of the Society, and that I then show that

the Supreme Court and the District Court both held that that was a fradulent transaction.

Now, it seems to me that that is all material, but for them to now call attention to another transaction, why, I suppose they are proving by other transactions in which Mr. Bradshaw has acted in the best of faith, but it does not establish or contradict the fact that in the Folts case the Court held that the officers had acted in bad faith. Mr. Bradshaw was not one of the defendants in that case. He was an attorney for the Society at that time, and in that capacity, of course, was charged with the duty of advising the officers with reference to the plan for the organization of the Globe Life case.

2762 Mr. Wells: Now, this, and I am through. We are all attorneys. I wish I could say that every client I have ever had acted in good faith on all occasions, but making the impression that Mr. Bradshaw, just because he was attorney for the Woodmen Of The World in the Globe Life case, participated in any fraud, or participated or advised in any fraud is a wrong aspersion. In the other case, where the Supreme Court and the District Court held—where Mr. Bradshaw was a defendant—that there was adequate consideration, acting in good faith, and honestly, and [fol. 631] affirmed by the Supreme Court of this state, if that is not competent to rebut the attorney's aspersion in the other case, I cannot see it. The fact is I first moved the exclusion from the record for that reason.

The Court: You may answer.

A. I don't know what they are selling for. There were two bond issues put out. At first the purchaser issued a million dollars on the building, I think, and maybe a little more, I don't remember the exact amount, and those bonds were sold, issued on the basis of the security of the leasehold interest, and then afterwards—that was about a million, and I think then $700,000 worth of bonds were sold and they were called real estate bonds—that may not be just the term, but, anyhow, they were secured by the real estate on which the building stands. Now, those bonds got down in these days, sometime ago, below fifty, and I have had them offered recently to me—of course, that is the best and the first security, because they could wipe out the million dollars. I think they would stand as a first mort-

gage, this mortgage on the real estate, and still have the building on it. I think were selling—had been selling as low recently as sixty and seventy. I had some offered to me not very long ago, I think it was along about seventy-three.

[fol. 632] Recross-examination.

By Mr. Stewart:

2763 Q. You said that it was charged in this case of Price against Fraser that you and Mr. Fraser received a million dollars out of that transaction.

2764 The Court: Is that another case that you are talking about?

2765 Mr. Crossman: The Price case.

2766 Mr. Stewart: The Price case.

A. I didn't mean to say that it was charged in the petition that we received a million dollars, but it was charged that we did get money out of it.

2767 Q. All right.

A. No; it was the press that charged we got a million dollars, very unfavorable press.

(Witness excused.)

[fol. 633] W. C. Braden called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

2768 Q. Please state your name, residence, profession or occupation.

A. W. C. Braden, Omaha, Nebraska, attorney.

2769 Q. What is your residence address?

A. 5218 Chicago Street.

2770 Q. Are you connected with the Woodmen of the World Life Insurance Society at this time?

A. Well, as a member of the Board of Directors, and have another title, assistant general attorney.

2771 Q. Are you also an auditor?

A. I am an auditor, and being an auditor I am also a member of the Board of Directors, because the auditors are all members of the Board.

2772 Q. How long have you been connected with the Woodmen of the World Life Insurance Society?

A. I have been a member of and attended every Sovereign Camp convention since 1917. I was made a member of the Board of Directors in 1929. I was promoted to the position of auditor on the Board of Directors about the year 1933, and moved to Omaha and devoted my full time to the business of the Society, in the summer, I believe, of 1934.

2773 Q. Where did you reside previous to coming to Omaha?

[fol. 634] A. In Lake Charles, Louisiana.

2774 Q. What was your profession there?

A. I was both a practicing lawyer and a judge.

2775 Q. How long have you been a practicing lawyer?

A. Since 1910.

2776 Q. For how many years did you serve in a judicial capacity in Louisiana?

A. For sixteen consecutive years.

2777 Q. When did you say you moved to Omaha?

A. As I recall, the spring of 1934.

2778 Q. What has been your specific duties in connection with the Woodmen of the World Life Insurance Society since you have moved to Omaha?

A. They have dealt primarily with the investments of our Society. When I first moved to Omaha—and I believe I was brought to Omaha in order that I might have supervision and have charge of, may I say, troublesome investments. During those days of the so-called panic many people did not or could not pay taxes, many municipalities having no tax revenue could not pay the interest or principal on the municipal bonds which we owned. The business of servicing those municipal investments became quite a business and I headed the department which looked after the servicing of investments that were in default, about to go into default, and trying to refinance and readjust those situations.

2779 Q. Do you recall about how much of the investments [fol. 635] of the Woodmen of the World Life Insurance Society were in jeopardy by default and approaching de-

fault, in 1934, when you took charge of that department?

A. The amount in jeopardy was tremendous, the amount in actual default was approximately four million dollars.

2780 Q. And you devoted your time to rehabilitating and servicing those investments from that time up to the present?

A. I devoted my time almost exclusively from the time I came to Omaha until about a couple of years ago to that work, when, at that time, about two years ago, our finances had improved to the extent where our defaults are practically nothing. Therefore, since that time I have devoted my attention to not servicing defaulted bonds, but to analyzing our investments in municipal bonds, in railroad securities and all other securities in which we invest, for the purpose of furnishing information to the finance committee as to what investments we felt were doubtful securities, what investments we felt justified our consideration in disposing of, not in default, but because of some future danger to their paying ability. And my work has always been with the investments under the supervision and direction of the finance committee.

2781 Q. Since you became a member of the Board of Directors has there been under consideration by the Board and its members the disposition of its radio station WOW?

A. There has been back, certainly, at least to my recollection, as far as 1937. If there was some discussion in the [fol. 636] Board prior to 1937, I don't personally recall it.

2782 Q. Did you participate in the discussion of that consideration with the members of the Board of Directors in and out of session?

A. I have almost continuously since we thought there was an emergency in 1937, which made it appear to us necessary to consider a disposition of that station. From that time on it has been a source of constant discussion and consideration by the members of the Board, and particularly by those of us who resided in Omaha.

2783 Q. Were you a member of the committee with Mr. Mooney, Mr. Plunkett and Judge Hines that made the report and offered a resolution through Mr. Hines at a meeting of the Board of Directors in August, 1942?

A. I was.

2784 Q. Known as Exhibit 9 in the record?

A. If that is the one that refers to that resolution, that is correct.

2785 Q. As a member of that committee of the Board of Directors to investigate and recommend an action to the Board of Directors, what did the committee have before it, and what did you consider in the way of facts relating to the radio and its disposition?

A. This committee was furnished Mr. Bradshaw's complete files, including all correspondence which he had carried on, all memoranda which he had made, all the originals [fol. 637] from the beginning of his attempting to sell to a corporation, and of the formation of a limited partnership, and the articles of limited partnership, a memorandum giving the exact terms in figures, consideration for the lease as it was finally executed was furnished to this committee by Mr. Bradshaw.

2786 Q. Did that committee give full, complete and devoted consideration to all these facts relative to that matter?

A. That committee not only examined such things as were in that file, but that committee discussed it with Mr. Ruess, who was personally familiar with the radio station and its transactions; spent considerable time with Mr. Bradshaw, having him detail to us in more particulars than he had to the Board, the problems that had confronted him in his negotiations leading up to that time. We looked at the statutes of the State of Nebraska relating to the formation of a limited partnership, to determine the question of the security that might be behind that company. We went into every imaginable feature that I can think of, and reached the conclusion that a lease of that radio station upon the terms, and under the conditions that were indicated in this final lease as finally consummated was to the advantage of this Society, and introduced this resolution in order that the matter might be discussed before the Board as a whole, and the Board be given that information, but primarily in order that we might show a chain of title and give evidence of our Mr. Bradshaw's authority to enter into and negotiate that lease.

[fol. 638] 2787 Q. Did you have a tentative form drafted of the lease that was ultimately entered into?

A. We did, and believe that the lease that we were furnished by Mr. Bradshaw on that occasion was identical with the one finally executed, except it may have the one—the one finally executed may have had a bankruptcy provision inserted at our suggestion or Mr. Hines' suggestion.

That was the only change that I know that might have been made between the blank form of lease we were given at that time and the lease as finally executed.

2788 Q. Did you have the figures that now appear in the lease that was executed, the monthly rental for the term of years and every other provision in it?

A. We did, and I compared them with my memorandum which I had, and unfortunately do not now have, with the written lease after it was executed, and the figures that Mr. Bradshaw gave us were identical. Not only did we have that information, but we, as the committee, in verbal discussion of that matter, gave that information to the entire Board of Directors, and I remember particularly stating that the terms of the lease aggregated a total rental of about $1,100,000 over a period of about fifteen years. I remember reporting it to the Board in session that the aggregate amount of the monthly rentals represented on a three per cent interest assumption $855,000; $910,000 on a four per cent interest assumption, which is equivalent [fol. 639] to $910,000.

2789 Q. You figured $910,000 at three per cent, and $855,000—(interrupted)

A. At three per cent $855,000, and at four per cent $910,000.

2790 Q. Would you have supported and voted for that resolution if you had not had those terms and known that this lease would include those terms and those provisions and that amount of rent?

A. I would not, as a member of the Board of Directors, have authorized Mr. Bradshaw to enter into any contract to lease that I did not think was in the interests of this Society.

2791 Q. Was the lease of the space in the building that was to accompany this lease of the facilities of the radio considered together or in conjunction?

A. It was considered by our committee, by myself personally, and considered by our committee, and by me personally, to be a valuable consideration and an adjunct to this lease.

2792 Q. Were the figures considered that were afterwards entered into as shown by this lease of $2,117 per month?

A. They were the same; with reasonable certainty I am

positive they were the same rentals that the radio station had been paying for the lease.

2793 Q. Were these facts and the figures and the terms, provisions, related by the committee to the Board before this resolution was adopted?

A. Yes. Mr. Wells, the business of the Board is not [fol. 640] all done by formal resolution. The management of the affairs of this Society is done by discussion between the executive officers and the members of the Board, and the president and executive officers are given the benefit of the views and knowledge and opinions of the members of the Board. No record is made of all of the things that we consider, and how we reached the conclusion which is ultimately evidenced in the resolution.

2794 Q. On what other occasions did you participate in discussions with the members of the Board in session and out of session regarding a disposition of this radio?

A. I will say that back as far as 1938 and 1939 there were those on the Board who advocated the disposition of this radio for various reasons that have been testified to and will be testified to. I was not so impressed with those arrangements advocating a sale of this radio station until about the year 1941. And my first appreciation of the dangers of our continued operation was called to my attention in sitting around the table with representatives of other fraternal organizations who were engaged with me in adjusting financial troubles of municipalities. In meeting those gentlemen the question was frequently asked me, "Isn't the Woodmen fearful that its continued operation of the radio station, making the profits that station is making, is going to jeapardize the business of all fraternal insurance societies in the matter of bringing on a tax on premiums and excessive earnings?" From that time on I began to give more personal consideration to the danger [fol. 641] that they had called to my attention than I had before.

2795 Q. How long did that discussion continue with the members of the Board, and how frequently?

A. With those members of the Board who resided in Omaha the question of the dangers of operation of the radio, the question of the advisability of trying to dispose of the radio was discussed quite regularly and very frequently. It was discussed by the auditors, the seven mem-

bers of the Board of Directors who constitute the auditors, at nearly every one of its meetings from, I would say, 1937 or 1938 up to this time, and was discussed by the entire Board informally, without reaching any definite conclusion, on every occasion when the subject matter was referred to in the reports of Mr. Bradshaw.

2796 Q. After these conferences and discussions among the members of the Board over a period of four or five years, what was the final conclusion of the Board?

A. The final conclusion of the Board unanimously and seriously reached, I think was at the meeting in the spring of 1942, when the resolution was offered and unanimously approved authorizing Mr. Bradshaw to negotiate or continue to negotiate to dispose of the radio station. I would say that from that meeting on it was the unanimous opinion of our Board of Directors that the radio station should be disposed of to the very best advantage that it was possible to dispose of it.

2797 Q. What was the apparent judgment of the Board in [fol. 642] March, 1942, to which you referred, as to the price that might be obtained or would be accepted for the station?

A. At the March meeting of the Board Mr. Bradshaw reported the results of his efforts to determine at what price the radio station might be sold, and especially at what price the Federal Communications Commission might approve, and according to my recollection he reported to us that from all sources of information he believed that the Federal Communications Commission would probably approve a sale of Radio Station WOW for a sum between $600,000 and $650,000. The reason I recall that was because in the formation of the resolution which was presented at that meeting some of the members of the Board wanted to specifically authorize him to sell or lease the station for that sum, and I definitely recall that Mr. Bradshaw said that while that might be all he could ultimately get for it, that we should not make that a matter of record, because if we did it would preclude him from getting more, which he hoped to do.

2798 Q. What did he say he hoped to get for it?

A. My recollection is between $800,000 and $850,000, and that it would be, in his opinion, very difficult to obtain the approval of the Federal Communications Commission

of such a price, but that he hoped to accomplish that purpose.

2799 Q. Did the Board ever authorize, lead or request Mr. Bradshaw to dispose of this radio station at any sum without having before it all the facts as relating thereto, [fol. 643] the price that could be received and what they would be satisfied to approve?

A. At no time did we give him any such authority. I know of no member of the Board who wants to abrogate his responsibility and delegate all of that authority to anyone. I did not personally when I was fully informed and knew the approximate terms and conditions under which that would be sold.

2800 Q. It is charged in this petition that you and your six associates who resided in Omaha dominated and controlled the Board of Directors. Is that true?

A. Mr. Wells, in my long service on the Board I have never seen the slightest indication of anybody, executive officer or any fellow member of the Board attempting to dominate anyone. I think it would be hard to discover fourteen men who worked together with such a unity of purpose, who had such regard for each other's opinion, and on which Board there was such little effort on behalf of anyone to dominate anyone else. The conclusions of our Board are reached, invariably, upon giving reasons and argument and convincing men, not by domination.

2801 Q. Is there any spirit to dominate on that Board, or has there been such spirit since you have been a member of it?

A. There has never been.

2802 Q. Has there been any spirit of subservience on the part of any member of the Board?

A. There has not been. I personally have many times spoken out to approve things that were not suggested by [fol. 644] executive officers. I have, as a member of the Board, on more than one occasion, voted for the performance of some policy or fulfillment of some policy that was not advocated by the executive officers. And there has never been anyone, to my knowledge, on that Board who did not feel that they were not only privileged to speak, but that they were encouraged to speak.

2803 Q. Did every member of that Board assume and practice that attitude?

A. So far as I can tell, yes, Mr. Wells.

2804 Q. In Paragraph 9 of the petition it is charged that you, Mr. Bradshaw, Colonel Patterson, Mr. Newberry, Mr. Ruess, Mr. Miller and Mr. Holston shortly prior to September 1, 1942, or at any other time, in violation of your duties as officers of the Society and the trust reposed in you as such officer, devised a plan to unlawfully procure for the benefit and profit of yourself, your friends and your associates the possession and control of Radio Station WOW for a grossly inadequate consideration. May I ask whether or not you participated or concurred in or acquiesced in any plan by which there would be a benefit or profit procured for yourself in that transaction?

A. I did not, and there was no such plan.

2805 Q. Do you think the price or consideration received was adequate or inadequate?

A. I think the price received was adequate and more than I had for some time hoped we could get.

[fol. 645] 2806 Q. Have you any arrangement or understanding, directly or indirectly, with the stockholders of Radio Station WOW, Inc., or anyone else, by which you will receive any benefit or profit by way of ownership in stock or participation in the earnings of that organization?

A. I have not.

2807 Q. In making this lease did you ever hear any discussion or any relation to that matter of any scheme to control or power to influence, of that station for any purpose?

A. No, sir, I did not.

2808 Q. You have no stock, not anticipating to get any stock, no agreement about it, or any profit?

A. None whatever.

2809 Q. You, your family or your friends or your associates?

A. No, no; no one that I know directly or indirectly, or in any other manner.

2810 Q. It has been testified here by some of the members of the Board as to their reasons for that action in concluding to dispose of the station. Briefly enumerate your particular reasons.

A. I had two primary reasons: One was that I believed from all of the facts before me that Radio Station WOW had ceased to be of any benefit in the way of good-will or

advertising to the Woodmen Of The World Life Insurance Society. I believed that the station had reached the peak of its earnings and revenue, and that now was the time to sell to better advantage than we would have again in the [fol. 646] future.

And the additional reason, of fearing that our operation of that station might build up our taxation, which we are not prepared to pay.

May I state for myself, there is a fear that we might be taxed—there is no feeling on the part of the Woodmen of the World that it will be taxed for legitimate purposes, no desire to be a tax dodger. The Woodmen Of The World and all other fraternal benefit societies spend much more money on fraternal activities than we would spend if we paid the taxes that commercial insurance companies pay, but if we had to pay those taxes and still carry on our fraternal activities we would have to add that charge and that burden on our membership, our policies; our certificates of insurance are not loaded for the purpose of paying a double tax in the way of expenditures for maintenance of tubercular hospitals, in giving aid to needy members all over the country, and in all of the fraternal activities that we undertake. They cost us a lot of money. We could not continue to do that and still pay a premium tax on our premiums, and an income tax on our excess earnings without passing that burden on to our membership in the way of increased premiums for the insurance. That is what I mean, and I don't mean to give the Court the idea that the Woodmen Of The World is trying to avoid its responsibility for paying legitimate taxes.

Another reason I feel that it is unfair in this crisis for [fol. 647] the Woodmen of the World to hide behind its tax exemptions in the operation of the radio station, and secure an income of $200,000 or $300,000 a year, for which there is no reason to exempt from taxation, and which I feel should be subjected to taxes, and I reached the conclusion advisedly that that revenue, whether we owned the station or not, should be taxed and will be taxed, and I therefore approached this lease from the point of believing that in the contract we have made the Woodmen Of The World will derive more revenue from that station for the next fifteen years than we would have derived if we had continued to operate it. The experts have testified that the

revenue, if the proceeds of that station were taxed, would be from $28,000 to $60,000 a year. If all those statements are correct, and I believe they are correct, that inevitably that return will be taxed; that this lease gives us a greater return each year for fifteen years than we could possibly get by the operation of that station ourselves. That is one of the things. The other is my belief that the station has reached its earning peak now, and it will be testified to by experts in this case, the depositions of experts, that plans are under way which will bring the danger of competition to the area that we serve in a higher degree than has existed in the past. I believe that television, frequency, modulation and all of those things is going to make competition much greater. I believe that the regulations, future regulations by the Radio Commission is going to make it impossible [fol. 648] for Radio Station WOW to maintain the net earnings it showed in 1942. Believing that, I believe that it is considerably to our advantage to dispose of this station at this time and not wait until the horse had got out of the barn before we closed the door.

May it please the Court, I approach that matter a little differently from some of the others because since 1934 my business has been finance business, I try to analyze investments and things that the Woodmen Of The World owns; I try to devote my attention and ability to foreseeing trends and trying to handle our investments so that we might avoid losses that we see are in the offing, and from that training and from that personal investigation I personally reached the very definite conclusion that we not only should get rid of it because of the fear of the taxes on our insurance business, we should get rid of it because I don't think we should continue to take that earning without subjecting it to taxation at this time, and our Government needs money so bad, and we want it to have it, and I do think with the competition and future regulations that there will be a reduction in the earning power of that station, even though we continue to operate it.

Those are the reasons I have given, and I give them because I am charged with having arrived at the conclusion for fraudulent purposes. I would like to give the Court the things that might show that I did not arrive at it for [fol. 649] fraudulent purposes, but I had good reasons for reaching the conclusions I reached as a member of that Board.

Cross-examination.

By Mr. Massey:

2811 Q. Mr. Braden, it is charged in Paragraph 13, I believe, of his petition, that the resident officers of the Woodmen Of The World Life Insurance Society dominate and control Radio Station WOW, Inc. I will ask you if you have any say whatsoever in the management of the new corporation?

A. I do not.

Cross-examination.

By Mr. Stewart:

2812 Q. Mr. Braden, you devote all of your business time to the Society?

A. Yes.

2813 Q. And have since when?

A. 1934, I believe, Mr. Stewart.

2814 Q. What compensation do you receive from the Society?

A. I receive a total salary of $15,100 a year. I don't know how the hundred got in, but in making our income tax return Mr. Pakes tells me I have to put that in, proportioned $3600 as compensation for my position as auditor, the balance for the services rendered in the legal department to the finance committee.

[fol. 650] 2815 Q. I believe you said you reached the conclusion in 1941 that the radio station should be disposed of.

A. I started at that time, had it called to my attention from probably a little different angle, and for the first time began to seriously consider what it might do to our insurance business.

2816 Q. Why did you reach the conclusion that it should be disposed of?

A. According to my recollection, because of, I believe, the introduction of a bill in the 1937 Legislature in Nebraska, and reports made by various officers indicating that there might be a need for an immediate disposal of the station to avoid consequences, and probably to avoid being compelled to dispose of it. I voted for that resolution at that time because of the exigency of that occasion, but I really became an advocate of the disposal of this station in 1941.

2817 Q. What time in 1941, as near as you can recall?

A. I cannot tell you, Mr. Stewart.

2818 Q. You say you favored its disposition in 1937 because of some bill that was offered in the Legislature?

A. Because of the report made to me the officers of our Society and informa ion given me in the Board meetings. I had no personal—made no personal investigation, I had no reason for that conclusion except the information that was there imparted.

2819 Q. Is that the bill that Mr. Bradshaw produced here yesterday?

[fol. 651] A. I think it was produced here yesterday, if I am not mistaken.

2820 Q. Of course, that bill did not pass the Legislature, did it?

A. No, sir.

2821 Q. And did you then conclude that it was desirable for the Society to keep the radio station and continue to be of that opinion until 1941?

A. I did not have such a decided opinion, Mr. Stewart, on whether or not it should be kept or sold after that danger passed, until 1941, when I began on my own hook to make my own investigation and I reached my own conclusion.

2822 Q. Is there any record on the minutes of the Board of Directors of any effort or suggestion by you in 1941 that the station should be disposed of.

A. I don't think that there is any record of that anywhere except on the occasion when I voted affirmatively for certain resolutions that were adopted and are now in evidence. The method of handling the business of the Woodmen of the World is not done by resolution. We buy and sell forty to fifty million dollars of securities each year without any resolution.

2823 Q. I understood you to say the monthly rental in the lease that was submitted to you when your committee met in August of 1942 was identical with the amount that was in the lease finally signed?

A. Yes, sir.

2824 Q. And that the provisions of that lease were the same as the one finally signed, with the exception of the [fol. 652] bankruptcy clause?

A. That is the best of my recollection, Mr. Stewart. There may have been one or two other minor changes, but

the only one I could recall when I read the executed lease shortly after my investigation; I could not recall any other change.

2825 Q. You understood at that time, that is, the time of the meeting of your committee, that the Society had offered to accept the rental named in that lease?

A. I understood that that was Mr. Bradshaw's proposal and what he was setting forth and what he hoped to get.

2826 Q. What is the reason why it was not put in the report of the committee or in the resolution of the committee, the amount of rental that the Society was to receive under the lease which you were approving?

A. The lessee or the purchaser, as the case might be, had not yet formally agreed upon these terms, and myself, as I understood it, the lease or sale was still in process of negotiation. Any report that we might make of those terms would in my opinion, have precluded Mr. Bradshaw from trying to change those terms or conditions, or from dealing with someone else who knew—who had seen our cards on the table, but had not shown theirs.

2827 Q. Well, then Mr. Bradshaw was still in position to deal with other people at that time?

A. He was still in position. Our resolution did not direct him to deal with any specific person. As a matter [fol. 653] of fact, at the time we made this report the personnel of the prospective lessee was entirely different from that which finally constituted the WOW, Inc.

2828 Q. Who were those in the proposed lease at the time your committee reported upon that matter?

A. I have nothing except Mr. Bradshaw's disclosure, and I recollect that the Swansons— I cannot tell just whether Mr. Erickson came in the picture—was in the picture at that time or came in later. But primarily Mr. Gillin and his associates, whoever might be satisfactory to him, was contemplated.

2829 Q. I understood you to say that Mr. Bradshaw reported at your meeting in March of 1942 that he had been informed the FCC would not approve a sale at a price of more than—what was that figure?

A. Between $600,000 and $650,000.

2830 Q. You are sure it was not more than that?

A. I am. That is my recollection. It may have been more than that, but that is according to the best of my recollection, it was that.

2831 Q. To refresh your recollection, reading from an exhibit that is in evidence, it is a report of the executive session of the Board of Directors held March 5, 1942, in the second paragraph here, report of President Bradshaw: "Inquiries instituted by persons familiar with the FCC had indicated that the FCC might approve the sale of Radio [fol. 654] Station WOW for a sum somewhere between $650,000 and $800,000." Does that refresh your recollection, Mr. Braden?

A. It does not. I accept that as being recorded, but it is still not my recollection.

2832 Q. Now, I understood you to say that you and the other directors did not delegate the authority of the Board in connection with the radio station, to Mr. Bradshaw or to anyone else.

A. If you attack that as a legal phase on the delegation of authority, possibly in the passage of this resolution, which was of necessity passed before the lease was executed, we delegated to him the power to sell or lease this station on terms not mentioned. In my dealings with Mr. Bradshaw for twenty-five years I have learned to know that he has never failed to carry out a commitment before the Board of Directors nor to any other living man, and I assumed that with a record of that sort he would keep faith with us and do what he said he would do.

2833 Q. But you did leave it to him to determine the terms of that lease, didn't you, Mr. Braden?

A. Legally under the passage of that resolution, that is true.

2834 Q. Yes. And likewise back in the earlier days you had delegated to Mr. Bradshaw, with the consent of the finance committee, to determine whether the station should be sold or not, had you not?

A. Yes, sir.

[fol. 655] 2835 Q. And you had also delegated to Mr. Bradshaw that if it was to be sold that he should make such disposition of it as he deemed advisable?

A. That is the purpose of the resolution. I, for one, Mr. Stewart, have always doubted the legal necessity of any resolution. I have rather felt that Mr. Bradshaw and the finance committee possibly had authority without any resolution of the Board to sell this station, and I am still decidedly of the opinion that the only reason the resolution

was ever passed by the Board was to satisfy the purchaser or the lessee, who might want to have evidence of our authority to execute such a contract.

2836 Q. Well, as a legal proposition, since you have mentioned that, wouldn't you say that when Mr. Bradshaw was given the power to make such disposition of the radio station as he deemed advisable, that the power of the Board was then being delegated to him for that purpose?

A. Legally, but at the time I voted for that resolution Mr. Bradshaw had always heretofore given definite statements of what he would do in furtherance of that authority.

2837 Q. You stated that you believe the station was no longer of value in creating good-will. Now, when did you reach that conclusion, Mr. Braden?

A. It is a little difficult to set the time, Mr. Stewart. In going through the South as I have had to do——(interrupted).

2838 Q. Well, just pardon the interruption.

[fol. 656] A. I beg your pardon.

2839 Q. I don't care for the reasons. Just state it approximately if you can. If you cannot, say so.

A. Probably 1939; I would say probably 1940 on.

2840 Q. You also said that you thought the station had reached the peak of its earnings. About when did you reach that conclusion?

A. About the first part of 1942.

2841 Q. You were mistaken in that conclusion.

A. I do not think so.

2842 Q. Well, didn't the station make considerably more money in 1942 than it did in 1941?

A. I was not analyzing the difference between 1941 and 1942. I was accepting the conditions that I saw coming, and I felt from those shadows that events cast that radio station earnings had about reached its peak. Whether I could confine that to the month of February, 1942 or the entire year 1942, rather than in the month of February, 1943, I don't know, but I have that decided opinion that Radio Station WOW has reached the peak of its earnings.

2843 Q. I am accepting your statement that you reached that conclusion early in 1942?

A. That is right.

2844 Q. That is, had reached the peak of its earnings?

A. That is right.

2845 Q. And the facts are that its earnings did increase [fol. 657] thereafter, during the rest of the year?

A. Increased over 1941?

2846 Q. Yes.

A. Yes, sir.

2847 Q. Now, you said that you had no fear of legitimate taxes that might be imposed on the Society. Do you consider a tax on the premium income of the Society a legitimate tax?

A. I would if we were a commercial type society, if we were not fraternal, but I tried to explain that we do plan fraternal——(interrupted)

2848 Q. Just let me interrupt you now.

(Question read.)

A. I would not consider it a fair tax. Now, may I explain why I say that?

2849 Q. Yes.

A. Because fraternal insurance organizations are exempt from taxation because of the money they spend on fraternal features and for semi-charitable purposes, and it would not be fair to have us to make that expenditure and also pay a premium tax.

2850 Q. Well, don't they use the money that they make out of the radio station for those purposes?

A. That goes into the general fund, as I understand, and is used for all purposes.

2851 Q. That is right. And the more that they make out of the radio station, the more they can spend in establishing hospitals and furnishing medical care to members?

[fol. 658] A. It wouldn't make very much difference in the management of our business, Mr. Stewart.

2852 Q. That is why you had the radio station?

A. When you come to $275,000 a year as against sixteen million from other sources, it is comparatively small.

2853 Q. Well, $270,000 would do a great deal to alleviate suffering humanity?

A. Obviously so.

2854 Q. You said that you believed that the increased competition was going to result because of development in the radio industry. Did you question the ability of the station to meet that competition?

A. I think the station under Mr. Gillin's management will always do what is necessary to meet any competition

and to protect our interests, but to my mind it is easier to make a profit in a non-competitive field than it is in a highly competitive field.

2855 Q. Well, the radio industry now is a competitive field, isn't it?

A. Yes, but each area has a different character of competition.

2856 Q. And for the reasons that you have given here today, why, you reached the conclusion in 1941 that the station should be sold, and you are still of that same opinion?

A. I am still of that same opinion, yes, sir.

2857 Mr. Wells: Mr. Stewart, may I ask him one other question on direct examination that is not proper on cross examination?

[fol. 659] Mr. Stewart: Yes.

Further Direct Examination.

By Mr. Wells:

2858 Q. Allegation is made in the petition, Mr. Braden, that this plan was to consummate an effect to place the radio station at the disposition of those interested in sponsoring the purchase by the Consumers Power of the Nebraska Power Company. Do you know anything about any plan of that sort, or did that enter into this transaction?

A. As far as I know, it did not enter into it. I know nothing of such a plan, and would not have any interest in it if I did.

Cross-examination.

By Mr. Massey:

2859 Q. Did that enter into your consideration of this matter?

A. It had no part in it, and would not have had.

2860 Q. Was that discussed by the members of the Board or by you, or in your presence by the members of the Board or those interested in the organization of WOW, Inc.?

A. I don't think that I or anybody else, to my knowledge, ever thought of it until the allegations were made in this suit.

2861 Q. That did not enter into your negotiations or deliberations in reaching your conclusion, in the least?

[fol. 660] A. Not in the slightest.

2862 Q. Did it with anyone else, so far as you know?

A. I never heard it mentioned nor discussed nor dreamed that it was in the mind of anybody connected with either the lessee or lessor in this transaction.

2863 Q. Were you interested in that transaction for or against either the Consumers or the Nebraska Power?

A. I was not.

Recross-examination.

By Mr. Stewart:

2864 Q. Did you know, Mr. Braden, that Guy Myers, who is the largest investor in the stock of the new company, had a commission of approximately $500,000 coming to him if the Consumers acquired the power facilities here in Omaha?

A. At that time I didn't know anything about his commission, Mr. Stewart. I knew that Mr. Myers was the fiscal agent for the Consumers and was attempting to purchase the Nebraska Power.

2865 Q. Did you know also that M. M. Meyers was interested in that transaction?

A. I did not.

2866 Q. Or did you know that Francis Matthews was attorney for the Consumers?

A. It seems to me at one time when the Mayor or somebody started a controversy and accused Mr. Matthews of [fol. 661] being the attorney for the Consumers, and I saw something about it in the World-Herald. That is all I ever knew about it.

2867 Q. Did you know that Mr. Bradshaw's son-in-law was interested as attorney for the banking syndicate that was purchasing the Consumers' bonds?

A. I knew that Thompson, Wood & Hoffman, the law firm Mr. Dawson is connected with, had approved all of the issues of Consumers' bonds. I didn't know who he represented, or why.

Recross-examination.

By Mr. Massey:

2868 Q. Mr. Braden, when did you first know that Guy Myers would be a stockholder in Radio Station WOW, Inc.?

A. I didn't know at the time—well, I don't think I knew it until after the lease was executed, or probably about the time of the execution.

Recross-examination.

By Mr. Stewart:

2869 Q. Did you know who any of the stockholders were going to be in the new company, prior to the execution of the lease?

A. I knew that Mr. John Gillin decidedly was going to be.

2870 Q. Anyone else?

A. No, I did not.

Witness excused.

[fol. 662] T. E. Patterson, called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

2871 Q. Please state your name, residence and your occupation.

A. T. E. Patterson, 422 North 31st Street. I am vice-president of the Woodmen Of The World Life Insurance Society.

2872 Q. How long have you been connected with the Woodmen Of The World, Colonel?

A. Officially since 1903.

2873 Q. Do you now reside in Omaha?

A. I do.

2874 Q. Where did you live previous to the time—(interrupted).

A. Tennessee; Memphis, Chattanooga.

2875 Q. When did you officially become connected, you say, with the Society?

A. As head counsel in 1903. I attended the first head Camp meeting.

2876 Q. When were you elected as an officer of the Sovereign Camp?

A. In 1905, on Lookout Mountain, Tennessee.

2877 Q. What position were you elected to?

A. We called it Sovereign Manager then. Well, it is sometimes called Sovereign Auditor, as we speak about now; equal to a member of the Board of Directors.

2878 Q. When did you become vice-president?

[fol. 663] A. In 1929.

2879 Q. As vice-president, what other position do you hold ex-officio in the Society?

A. I am not sure that I understood that question.

2880 Q. Are you a member of the finance committee?

A. Have been for years.

2881 Q. That is by reason of being elected vice-president?

A. That is right.

2882 Q. Do you spend your time chiefly in the City of Omaha in the discharge of your duties as an officer of this Society, as vice-president and member of the finance committee of the Society?

A. Practically all of it.

2883 Q. During this time did you have discussions and considerations and deliberate a continuation of the operation or disposal of Radio Station WOW?

A. I certainly have.

2884 Q. Through what period of time, briefly, did that consideration go?

A. I would not be able to fix the absolute fact, because whenever I got an opportunity to talk about it, I tried to get rid of the station.

2885 Q. Are you the Colonel Patterson that the testimony shows as being against it?

A. I am.

2886 Q. What were your reasons for being against it?

[fol. 664] A. Well, my principal reason was that we were not in the commercial business. I joined a fraternal insurance society, and that is what I thought we ought to run all the time. Now, in the earlier days anything that would advance the interests of the Society and publicize it, I was heartily in favor of, and was interested in getting the original station in 1923. And, of course, eventually that thing began to look like it would take so much of our time, and I began to watch the thing, and then I began to advocate getting rid of it, and devote all of our time to advance the interests of the Woodmen Of The World Life Insurance Society, if our individuals would devote time to devising means by

which we could get new members instead of being called upon all the time, night and day, to devote so much time to the radio station, that I believe that our finances and membership condition would be in better shape today than they were even at the best days of the radio station.

2887 Q. Were you present at the meetings of the Board of Directors when some of these various resolutions were passed?

A. Until I heard an absent record the other day, I thought I was at every one of them; I didn't think I was absent at all. One time, 1929, somebody spoke about it, or 1930, or whenever it was. I thought I was at all of the meetings.

2888 Q. Were you present at the meeting of the Board of Directors in August, 1942?

A. I was.

[fol. 665] 2889 Q. Were you present on the particular occasion when the finance committee, composed of Judge Braden and Judge Hines and Mr. Mooney and Mr. Punkett, made their report?

A. I was.

2890 Q. And offered the resolution that was finally adopted?

A. I am familiar with it. I was there.

2891 Q. Were you advised of the negotiations that had been taking place and were under consideration at that time?

A. I think that I am familiar with most every step taken by Mr. Bradshaw, every opportunity I had to advise myself, and around the building, and also when the Board was on, we knew every step that he took. He would say "I am dickering now with so and so", and "I am dickering now with so and so", "I believe I can get so and so." And we had certainly authorized and urged him to get rid of the station under the best conditions possible for the Society.

2892 Q. Did this committee report to the Board in your presence, and did you hear the actual figures that were being considered and hoped to receive, and the conditions of this lease?

A. I will say yes. Now, if you ask me to verify any of those figures, I would go to the record for it.

2893 Q. After hearing their report, reporting all of the facts, you then supported this resolution?

A. I was tickled to death to do so.

2894 Q. It is charged here, Colonel Patterson, that you and your associates formed a plan by which this radio would [fol. 666] be disposed of and to other parties in which you would participate in the profits and benefits of that station. Is that true?

A. Not only untrue, but it is ridiculous.

2895 Q. Do you own any stock in that radio corporation?

A. I do not.

2896 Q. Have you any understanding or agreement, directly or indirectly, with anybody connected with that station, under which you are to participate as a stockholder in any of the profits or benefits of that station?

A. I never heard of it until I heard it here in the court.

2897 Q. Any of your friends or associates?

A. No.

2898 Q. Would you have participated?

A. I certainly would not. And I want to say this: I don't think there is a man on the Board that would listen to it for a minute.

2899 Q. It is charged here also that you resident officials dominate and control the Board of Directors. What about that?

A. It makes me laugh. No. The Board of Directors is dominated just by the majority of the Board of Directors.

2900 Q. Is there any spirit of domination evidenced in that Board by anyone?

A. Absolutely not.

2901 Q. Has there been during the time that you served on that Board?

A. Never.

2902 Q. Is there a spirit of independence of expression [fol. 667] of thought or conclusions on the part of every member of the Board?

A. Yes. And I hope every other board of every kind is just as independent as we are on this Board.

2903 Q. It is further charged that the Board of Directors of the Woodmen of the World control and direct the activities of Radio Station WOW, Inc. as now organized. Do you have any control or participate in the management or direction of the operation of that station now, or have you since the 15th day of January, 1943?

A. Absolutely not.

2904 Q. Does the Woodmen of the World have anything to do with its operation or control?

A. Absolutely not.

2905 Q. Have you any control over Harvey Milliken or Mike Meyers or Guy Myers or Jake Isaacson?

A. No.

2906 Q. In the consideration of making this lease was there intimation or purpose or thought on the part of the Board of Directors to formulate a plan by which the station could be used to sponsor the purchase by the Consumers Power Company of the Nebraska Power Company?

A. No, sir.

2907 Q. Did that enter into the matter at all?

A. Positively not.

2908 Q. Are you interested in that matter at all?

A. Absolutely not.

[fol. 668] (12:03 o'clock P. M., noon recess until 1:30 o'clock P. M.)

T. E. Patterson resumed the witness stand and testified further as follows:

Cross-examination.

By Mr. Stewart:

2909 Q. Colonel Patterson, how long have you been a member of the Board of Directors?

A. Since 1905.

2910 Q. Was the Board of Directors formerly called some other name?

A. Yes.

2911 Q. Executive council?

A. Executive council.

2912 Q. Do you recall about when the name was changed from executive council to board of directors?

A. No, I could not do that.

2913 Q. But it is the same body, just under a different name?

A. Same body.

2914 Q. Who are the other members of the finance committee now?

A. The president, vice-president and secretary named in the by-laws, and the Board of Directors. I think the Sover-

eign Camp, the last time, added some other names; they added an alternate so that each man, in case he would not be present, they could sit in his place. It would be Mr. Braden, Mr. Ruess, Mr. Miller. I think that is all.

[fol. 669] 2915 Q. Let us see if I can clear this: The finance committee is composed of Mr. Bradshaw and yourself——(interrupted).

A. And Mr. Newberry.

2916 Q. (Continuing)—and Mr. Newberry. Three of them, and then there are three additional, in the event one is absent, why, there is one to take his place?

A. The facts are they all sit at every session.

2917 Q. But three of them are in the nature of an alternate?

A. I would not say that.

2918 Q. Colonel Patterson, were you one of the defendants in the case of Folts v. Globe Life Insurance Company?

A. I really don't know whether I was or not. I was secretary of the company.

2919 Q. Well, there is a Patterson named as a defendant.

A. Yes, it must have been me, but I was never in court; I was never called in court; know nothing about the transtion at all, either.

2920 Q. You stated that you had wanted the radio station disposed of. How long has that been your attitude, Colonel?

A. I would not fix any period, Mr. Stewart.

2921 Q. Well, approximately.

A. I would say certainly when we moved up to the new building; I would say certainly then.

2922 Q. That was about when?

A. About 1932 or 1933.

2923 Q. Is there any record in the minutes of the Board of [fol. 670] Directors of your desire to dispose of the station, up to 1942?

A. I rather think not. It was all discussed generally, don't you know, and we don't keep everything, except something is done like by the Board of Directors, that is, anything is passed up, they do appear of record.

2924 Q. Is there any record that any of the directors wanted to dispose of the station up to 1942?

A. I really wouldn't know without looking at the record.

2925 Q. There is none to your knowledge?

A. Not to my knowledge.

2926 Q. Did you know what the lease rental was to be when the Board of Directors adopted the resolution in August of 1942, approving the report of this special committee?

A. I will say yes to that, just in a general way. Now, the date, I would not say, but I would know when a resolution is proposed, you know, to us, in a general way.

2927 Q. Well, how do you know it? That is not in President Bradshaw's report on the negotiations?

A. No.

2928 Q. None that has been offered in evidence.

A. But it was in many discussions that we had together; many discussions that we had together.

2929 Q. Do you know why it was not in President Bradshaw's report?

A. I could say no, but I would like to explain.

2930 Q. All right.

A. I think it was for to permit him to make the best trade [fol. 671] for us he could. That is the reason, I think, the figure was not mentioned definitely in the report.

2931 Q. Well, as I understand you, the figures were in the lease, were they?

A. Yes; I would say yes.

2932 Q. Now, I think you said that the Board of Directors were not dominated by Mr. Bradshaw or anyone else.

A. I say no now again.

2933 Q. The disposition of the station, however, was left to Mr. Bradshaw, wasn't it, by the directors?

A. To the extent that the record shows, Mr. Stewart, yes, sir.

2934 Q. Yes.

A. Just to the extent that the record shows.

2935 Q. In 1937 the resolution gave to Mr. Bradshaw power to make such disposition of the same as may be deemed advisable?

A. Yes.

2936 Q. You voted for that resolution?

A. Yes. May I make an explanation of that?

2937 Q. Go ahead.

A. Let is stand.

2938 Q. All right.

A. I would like to say, if you don't mind, take that resolution itself, or any other action similar to that, by the Board,

my recollection is that is always done after Mr. Bradshaw had made a definite statement to us of what the proposals were for doing thus and so, and in that way I would at least [fol. 672] vote to go ahead, to do the best you can.

2939 Q. Then again in March, 1942 the Board of Directors adopted a resolution authorizing Mr. Bradshaw to negotiate and make a sale of the radio station?

A. Yes, sir.

2940 Q. And as I understand it, you and the other directors, or at least some of them have been for a long time of the opinion that the Society ought to dispose of the radio station?

A. I am just speaking for myself. I did that.

2941 Q. Yes; but the Society still owns it, doesn't it?

A. Still owns it?

2942 Q. Yes.

A. Now?

2943 Q. Yes.

A. The radio station?

2944 Q. Yes.

A. No.

Mr. Crossman: Read that last answer.

(Answer read.)

Mr. Crossman: We better clear that up.

Redirect examination.

By Mr. Crossman:

2945 Q. Colonel, does the Society still own Radio Station WOW?

A. I don't know much about legal technicalities, but I would say no. They have leased it for fifteen years.

[fol. 673] 2946 Q. It is leased?

A. It is leased for fifteen years. We have no control over it.

2947 Q. Now control over the operation?

A. Absolutely.

2948 Q. But it reverts to them at the end of fifteen years, whatever it is?

A. Yes.

2949 Q. But it is leased for fifteen years?

A. Yes, sir.

Witness excused.

FARRAR NEWBERRY recalled as a witness on behalf of the defendants, having been heretofore duly —, testified further as follows:

Direct examination.

By Mr. Wells:

2950 Q. Mr. Newberry, you are now secretary of the Woodmen of the World Life Insurance Society?

A. Yes, sir.

[fol. 674] 2951 Q. Have been since when?

A. March the 15, 1937.

2952 Q. Since March the 15, 1937 has the Board of Directors had under consideration a disposition of Radio Station WOW?

A. It has.

2953 Q. Have you participated in conferences in and out of Board of Directors meeting concerning that matter?

A. Yes, sir.

2954 Q. During that time?

A. Yes, sir.

2955 Q. How frequently has that matter be- discussed by you with the other members of the Board?

A. Quite frequently, Mr. Wells, informally and at every Board meeting since February, 1942. I am sure there was a Board meeting in 1937 in which it was discussed, but I believe not in the regular order of the Board's meeting as the business of the Board, from 1937 until February, 1942, if my memory is correct.

2956 Q. Did you hear and did you make suggestions personally touching that question of the disposition of the continuation of the operation of the radio by the Society?

A. Yes, sir.

2957 Q. What was your view about the matter?

A. My view had developed through some years of observation since I have been in Omaha, and particularly the last few years, the last three or four years, I would say in [fol. 675] my view the Society had gotten into a state of, you might say, unbalance, because of the importance that the radio had assumed. When the radio was originated in 1923 I was in the South.

2958 Q. What state?

A. Arkansas.

2959 Q. In what capacity?

A. State manager in the field.

2960 Q. That is, the field work?

A. Yes, that is the field work. And I recall with what enthusiasm people down there had, where our large membership is, welcomed the establishment of this station because it was a medium in the early days, when the waves were not so crowded, of disseminating the news of the services of this organization, fraternal, and explanation of certificates, and the various services. It was that year also that our tuberculosis hospital at San Antonio was established for the free treatment of members afflicted with tuberculosis; quite a bit was said on the radio about that, and by way of advertising and programs, and we were urged, I remember, through the magazines and letters and literature to have radios in our lodge halls so that the members might gather and hear directly from Omaha, programs, its instructions and information, and entertainment, instructions about the services of this institution. Maybe a society, maybe a camp would want to buy a set for that purpose—we did not sell sets for them here, but they were encouraged to have a set. Maybe some member [fol. 676] would have a set in those early days—didn't everybody have a radio set, but to begin with our boys gathered around and listened to programs from their own lodge, and had information how their home offices were run.

2961 Q. Can you get that program over the radio in Arkansas now?

A. No, sir; no, sir. It is with great difficulty that you can hear any great distance away, except after the other stations have closed down; perhaps 1:00 or 2:00 o'clock in the morning you can hear it in some parts of the South. But in those days, the pioneer days, when there were not so many stations and the waves were not so crowded with stuff, we could hear pretty well. And I remember how incensed we were over in the South where I live when this doctor down here that had a station——(interrupted).

The Court: Brinkley?

A. (Continuing) Dr. Brinkley, I believe it was, established a station which just drowned our station out, had a big power line. Our boys were incensed about it because they couldn't any longer hear clearly their station in Omaha.

2962 Q. All they could hear was Brinkley and his goats?

A. That is right. That thing went on until the radio got to such an extent that it became the absorbing thing in our Society. And I recall one day at an informal meeting when our auditors were in town, that was in the summer 1941, I think we were talking informally around the table about what should be done about the radio, which had come to the point where it just absorbed the majority [fol. 677] of interest around here in the way of speaking, and I very strongly advocated the disposition, if we could dispose of it without disadvantage to our members and the Society, that we do so, because after that time I took the view that this institution was originated nearly fifty-three years ago as a fraternal life protection society, and that that just absorbed our minds and our attention altogether. Now, here was an institution that had a great deal of money put down into it, and it was equipped with all the advanced machinery until it stood as one of the strong stations, not in power particularly, but in this area here for 200 or 250 miles out from Omaha, in perhaps all directions from Omaha. It was a power and was making money, because commercially it had been found to be a money-maker, but it had absorbed, I thought, too much of the interests of those who were trying to direct a fraternal society, and I said so on that occasion.

2963 Q. That was one of the reasons why you advocated the disposition of the radio?

A. That is right.

2964 Q. Well, you say that was back in the pioneer days of 1923 and 1924 and 1925. What is the condition today as to the use of the radio advertising the benefits of this Society, down in Arkansas?

A. It is of very little benefit, Mr. Wells, outside of this immediate territory.

2965 Q. 200 or 250 miles, on the average?

[fol. 678] A. Yes, something like that.

2966 Q. Around Omaha?

A. That is right.

2967 Q. What other reason did you have for thinking it should be disposed of, other than directing the attention of the executive officers from that profitable business of operating a fraternal society?

A. Well, that in my heart was the principal reason, and

fear of taxes, because we were operating a business commercially, very profitable, in connection with a fraternal society, which at all times has been exempt from federal and state income and premium taxes. Another, that there was some criticism, Mr. Wells, among other fraternal societies.

2968 Q. On what ground?

A. On the ground that we were jeoparizing the interests of the whole fraternal benefit societies, which traditionally are not taxed in this country, by establishing a commercial plant in connection with our Society, which was making good money, and therefore subject the whole fraternal societies and income to assessments of taxes.

2969 Q. Were you advised about the proposed legislation in Nebraska to tax this Society on its premiums, and to prohibit it from operating a radio?

A. Yes; I think three or four years ago there was such a bill in the legislature with reference to taxes on our Society.

2970 Q. Were you advised of the consideration of the [fol. 679] ways and means committee of Congress attempting to impose an income tax upon the earnings of the radio?

A. Yes, sir.

2971 Q. Any other reason that you can now recall that caused you to reach that conclusion that it ought to be disposed of?

A. I think that was the principal reason, it was just absorbing too much of the thought and attention of the officers.

2972 Q. Were you advised last year of the initiative petition being sponsored in Nebraska to tax the premiums or installments as you call them?

A. Yes.

2973 Q. You knew about that?

A. I saw a copy of it.

2974 Q. Have you been advised of the bill being now introduced and considered by the Legislature of Nebraska to impose taxes upon the contribution of members of fraternal benefit societies?

A. That is right.

2975 Mr. Stewart: May I ask you, Mr. Wells, if you are referring to the bill that has been offered in evidence here?

Mr. Wells: That is right.
Mr. Stewart: All right.

A. (Continuing:) I understand, Mr. Wells, there was such a bill in the Legislature.

2976 Q. And the efforts in Congress and Nebraska to impose taxes, and in Nebraska to prohibit the societies from owning and operating a radio, covers the tax question [fol. 680] so far as you are advised?

A. Yes, I will say it does. I might add this: This goes without saying, perhaps, that if the Legislature of our domicile state, where we have operated for over a half a century, should pass such a measure as that, it certainly would not be very long until other states would be doing the same thing.

2977 Q. It is a matter of law, I will ask you because I have understood you are a lawyer, but not much of a one?

A. That is right.

2978 Q. That if Nebraska were to impose a gross premium tax on foreign fraternal societies, under the reciprocal laws of the other states, it would operate automatically and impose a tax on us in all the forty-four states in which we do business without any special law enacted by other states?

Mr. Stewart: Just a minute. That is objected to as leading and suggestive, and calling for a conclusion, and a conclusion of law.

Mr. Wells: I announced that to start with.

The Court: I think what you have in mind is that it has been the custom and practice of states to pass reciprocal laws.

Mr. Wells: That is right. So not being much of a lawyer, he may tell us.

Mr. Stewart: I think he was smart when he got out of the practice.

[fol. 681] A. Well, I got on the Woodmen of the World, that is my judgment of it, and I am not unaware of the fact at all.

2979 Q. I think on your direct examination by Mr. Stewart that you related one other reason, something about an unsatisfactory co-operation among the employees.

A. Yes, Mr. Wells, I think undoubtedly there is some feeling between our employees who had been with us for many years while we built the Society itself, because, as I understand it, the schedule of wages and salaries for radio people, generally speaking, is higher than it is for clerks and stenographers and so forth in the regular course of our business.

2980 Mr. Crossman: May I do this?
Mr. Stewart: Yes.

Direct examination Continued.

By Mr. Crossman:

2981 Q. Continue with your answer.

A. I understand there is some feeling among the employees. We are all right there together in the same building. You cannot raise one person's wages very well without everybody around there knowing about it. It just seems like it is impossible to do it. Well, here is a girl in our actuary department, for instance, that has worked for us twenty years on a standard wage; she has come up as much as she can. The standard wage is not as much as this girl that works over there on the balcony that came on yesterday; we are paying the girl on the balcony maybe three or [fol. 682] five dollars a week more than we are paying this girl who has been with us longer, and is doing an essential piece of work for this institution. There is some trouble there. I could not put my finger on an individual case; I just know it is there. And that had something to do with my feelings in the matter about disposing of it.

2982 Q. Was it creating confusion and some interference among the morale of the employees?

A. It injured the morale, I would say, yes, I think, undoubtedly.

2983 Q. Were you present at the various meetings of the Board of Directors, the minutes of all of which are now in this record, so far as the radio station is concerned; were you present consistently as a member of the Board at its meetings, would you say?

A. I don't believe I missed a session of the Board of Directors since I became a member, for ten years.

2984 Q. Much is made, Mr. Newberry, of the fact that some of these records do not mention figures that went

into this lease, or figures that were discussed for sale. Did you hear any discussion of figures as a member of the Board, informally or formally, as these negotiations were proceeding?

A. Yes, informally. I don't believe that on any formal session of the Board that I could say that a figure was named, except in a general way that if we got what would be equivalent to the value, of from $600,000 to $800,000 for the station, we would be making a good deal.

[fol. 683] 2985 Q. Was that discussed on more than one occasion?

A. I think so.

2986 Q. Was it discussed during the general process of these negotiations and their developments?

A. Yes, but I couldn't identify the exact time or the exact place that it was.

2987 Q. Since you were here, Mr. Newberry, I think it has come in since you were here, Exhibit 9, which is the report of the special committee of the Board made to the Board on August 31, 1942. Will you read that over and familiarize yourself with its contents?

A. You don't mean to read it aloud?

2988 Q. No. You are now looking at Exhibit 10?

A. That is right; that is the resolution.

2989 Q. Now, the record is that Exhibit 9, report of the special committee, came into the Board and then that the resolution, Exhibit 10, was adopted.

A. Yes, sir.

2990 Q. Were you present at the meeting of the Board when the report of this committee, Exhibit 9, was considered by the Board?

A. Yes, sir.

2991 Q. In its report to the Board, other than the writing as is shown in Exhibit 9, did the members of that committee go into any detail with reference to figures and proposals and investigations which they had made, upon which their report is based?

[fol. 684] A. Well, I could not say that exact figures were discussed, but I have a distinct feeling about the sum which I mentioned awhile ago was generally considered a good price, if the deal could be made, but I could not say that exact figures were named in this discussion. I presume they were.

2992 Q. But you don't recall exactly?

A. I couldn't tell what they were.

2993 Q. Did you vote for the resolution, Exhibit 10?

A. Yes, sir, I did.

2994 Q. You have stated the reasons upon which you based your opinion with reference to the disposition of this station. Is it fair to ask you if your vote on resolution, Exhibit 10, was substantially based upon the same reasons?

A. Yes, sir.

2995 Q. And it is already in the record that the vote of the Board at that time was unanimous.

A. Yes, sir.

2996 Q. Mr. Newberry, it is charged in this petition of Dr. Johnson, and the charge is made directly against you as one of the defendants, that you with your other six associates, or the members of the Board, reading from Page 9 of the petition: "Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, that you with your other six individual defendants, in violation of your duties as officers of the Society, and the trust reposed in you as such officers, devised a plan to unlawfully procure for the benefit [fol. 685] of yourself and your associates and your friends the possession and control of Radio Station WOW for a grossly inadequate consideration." I am going to ask you bluntly, Mr. Newberry, is that true?

A. It is not.

2997 Q. As you came through these negotiations, as you considered these matters formally and informally as members of the Board, and as you came up to the time when the lease was imminent, and when the lease was actually made —I suppose you executed that, attested it as secretary of the Society, didn't you?

A. That is right.

2998 Q. Had there been any discussion among you or any of your associates at any time that any of them were going to have any interest arising out of this transaction, any personal interest?

A. Not one word of it.

2999 Q. Directly or indirectly, open, hidden, secretly, contingent or otherwise?

A. Not the slightest, not one word.

3000 Q. Now, another charge specifically made here against the individual defendants, Mr. Newberry, is—it is

only fair to tell you that it is made against you with the other defendants, the charge is made that you and the other six individual officers and directors of the Society made this deal in order to enable the Consumers Power District to propagandize its purchase of the Nebraska Power Com-
[fol. 686] pany. I am going to ask you bluntly, is that the truth?

A. Not one word of truth in it.

3001 Q. In all of these negotiations leading up to this lease, and in all of the discussions formally or informally of the negotiations in which you had any part, when did you first hear the charge made that the Consumers was in this transaction to obtain the station for the purpose of propaganda; when did you first hear that?

Mr. Stewart: That is objected to as not properly reflecting the petition in this case. The charges are that the Consumers are back of this.

Mr. Crossman: Maybe you are correct, so we will read it. I will read it. Please don't interrupt the conversation any more than to make the objection. I withdraw the question, and we will start over again.

Mr. Stewart: Men that are interested in seeing that the Consumers acquires the power facilities.

Mr. Crossman: Well, you have the faculty of shading language and words, but I don't think it is very much different from what I stated.

Mr. Stewart: Well, let's read it and see.

3002 Q. Well, I will read the paragraph, Mr. Newberry, verbatim so we will have no objection to that. I am reading from Paragraph 12, and Dr. Johnson says this under oath as a charge: "Defendant's Radio Station WOW, Inc."—that is the lessee corporation—"is dominated and controlled by men who have been and now are directly or indi-
[fol. 687] rectly connected with the Consumers Public Power District of Nebraska." Now, what, if anything, do you know about that?

A. I don't know that anyone is, any one of the directors.

3003 Q. And further—and I will read it—"or are personally interested in its acquisition of the power facilities serving Omaha, Nebraska and vicinity, which are now owned and operated by the Nebraska Power Company." Do you know anything about that?

A. No, sir.

3004 Q. Now, Mr. Newberry, I am going to take Paragraph 12 and couple it with Paragraph 9, both of which are found in this petition, in which Dr. Johnson says: "That shortly prior to September 1, 1942, the exact date being to the plaintiff unknown, the individual defendants, in violation of their duties as officers of the Society, and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit for themselves and associates, the possession and control of the radio station." Now, coupling the two paragraphs together, which I think it is fair, do you have any personal interest in making such a disposition of this radio station as would in any way contribute to the use of the station for propaganda purposes by the Consumers Public Power District?

A. No, sir.

3005 Q. When did you first hear—coupling the two paragraphs together—that that was said to have happened? [fol. 688] A. The first news that I had of it was the afternoon when the afternoon paper was brought up announcing the filing of this suit, and stating that we were charged with that.

3006 Q. That was the first you knew?

A. That was the first intimation I had of it.

3007 Q. Now, another charge is made against you, Mr. Newberry, which you will have an opportunity to answer, the petition says that you and the other six resident directors and officers of this Society dominate the non-resident directors, by which it is inferred, if not expresssly stated, that you dominate the affairs of the Society. What do you wish to say in response to that charge?

A. Simply that it is not true.

3008 Q. I won't say any more, if that is your answer.

A. That is my answer, yes, sir.

3009 Q. Now, another charge is made against you, which you shall have the opportunity to answer, and that is that you and your six fellow directors and officers here in Omaha dominate the lessee, Radio Station WOW, Inc. What is the fact about that?

A. The fact is it is untrue.

3010 Q. I think I have asked you this, I think I asked you whether you had any interest of this capital stock in the lessee corporation.

A. No, you didn't ask me that. I have not.

3011 Q. Do you have any interest in such stock, or do you have any outstanding commitments to acquire the stock or [fol. 689] any part of it?

A. None whatever.

3012 Q. Or do you have any outstanding commitment, written or oral, open or secret, to acquire or participate in any way the earnings upon that stock?

A. No, sir.

3013 Q. Either for yourself or your family?

A. No, sir.

3014 Q. Or any associate or friend?

A. No, sir, not anyone or anybody else.

Cross-examination.

By Mr. Stewart:

3015 Q. Mr. Newberry, you stated that the Society was in a state of unbalance because of the radio situation. When has that been your belief?

A. Well, it was a growing thing, although the term "unbalance" is not as well chosen as it might have been, but that is the feeling that I had.

3016 Q. Since when?

A. I said it had been a growing thing.

3017 Q. Well, when did it start?

A. I wouldn't say the day and the week and the month; it would probably be impossible.

3018 Q. I don't want you to say the day.

A. But at least for the last three or four years, I will say, [fol. 690] that has been a fact. We have had to add a number of employees on it, just been an increasing thing, and to the detriment, I felt, of the balance of the interests of the Society.

3019 Q. You also said that the station was of very little benefit to the Society outside of the range of 200 or 250 miles from Omaha?

A. Well, its strength, of cours is in that radius.

3020 Q. How long has that been your conclusion?

A. Well, it has been a fact that has been a gradual development, because take twenty years ago when it was established there were not many stations, the air waves, the air lanes were not as crowded as they are now, and you could hear stations, say, in South Tennessee, and you could hear

it in Texas and Florida and Virginia, where our membership is strong. You cannot do that today.

3021 Q. Well, how long ago did that take place?

A. Well, I cannot tell you the exact year. It has been a gradual development. As you know, radio has been a growing industry.

3022 Q. Would you say five years?

A. Yes, sir.

3023 Q. Ten years?

A. I would say five years ago the condition was pretty much the same as it is now. Our members in the South have not been able easily and at regular hours to hear their own [fol. 691] station.

3024 Q. How long has there been this fear in your mind of taxes being imposed on the Society because of the radio station?

A. For several years, Mr. Stewart, for the last few years it has been making money. In the earlier years it was a net loss. It is a danger, of course. The Society was putting its money in it with the idea of propagandizing its services and so forth. For the first six or eight years I think it operarated at a loss.

3025 Q. Because of the advertising and good-will which it was creating for the Society——

A. It was a loss.

3026 Q. (Continuing)—that is why it continued when it was losing money, is that right?

A. Well, that was one of the reasons, yes.

The Court: Continued to what?

The Witness: To operate after it started making money. I understood that to be your question.

3027 Q. My question was the Society continued to operate the station even though it was losing money, because it was an advantage in creating good-will?

A. Oh, in the early days.

3028 Q. To the Society?

A. Yes—no, I was not up here, Mr. Stewart, in those days, I was not an officer, had nothing to do with the operation of the station. That was my understanding of it.

[fol. 692] 3029 Q. You say this matter of taxes, in your mind, arose because the Society was making an income out of the station, is that right?

A. Yes, and because that is not a part of a fraternal benefit society's regular business. It is a commercial enterprise tacked on it.

3030 Q. Well, it was used as an adjunct in advertising the Society, wasn't it, Mr. Newberry?

A. Yes, as far as it will reach, and to a certain extent.

3031 Q. Now, the Society makes an income out of its home office building, too, doesn't it?

A. Yes.

3032 Q. Gets a profitable return on its home office building?

A. Yes.

3033 Q. Are you worried about taxes because the Society is making money out of running its office building?

A. Not at all. That is in no sense an outside enterprise. In many life insurance societies and companies, they own their own office plants and don't utilize all of the office space at all, and lease the upper half of it. I don't regard that as an enterprise that would occasion a greed or desire to reach for taxes.

3034 Q. What is the purpose, except for state and county taxes, what is the purpose of leasing out space in an office building?

A. What is that?

3035 Q. What is the purpose of it?

[fol. 693] A. Well, there is no use in letting it lie there vacant when people want it.

3036 Q. You want to make money out of it?

A. We want a decent return on the investment, just like we want a decent return when we buy some bonds from the State of Minnesota.

3037 Q. If you can get some income for the Society, you want to get it, and if you can get it for the state, you want it?

A. If it were not for the handicaps of the radio, the return part would be all right.

3038 Q. How long has this feeling between the employees existed?

A. I would not undertake to set a day and a month when that started. That has been a gradual proposition. For instance, the radio was growing, we needed to give the radio more space, sometimes we were willing to even cramp some of our departments in order to get them more space

without losing some tenant that we had under lease, make him get out of the building, and that did not help any in the feelings between our regular employees and our radio employees.

3039 Q. About how long has that feeling existed?

A. Well, I have only been living here a little over seven years, Mr. Stewart.

3040 Q. Did it exist when you first came here?

A. Not as much as it does now, I don't think. At least, I didn't notice it so much when I came. I was observing and trying to learn about the department, trying to learn what [fol. 694] makes the institution tick as a fraternal society.

3041 Q. Did it exist five years ago?

A. It did some, yes, five years ago, undoubtedly.

3042 Q. As I understand your testimony, then, these reasons that you have given where you thought the station should be disposed of, had existed for a number of years?

A. Well, some years, yes.

3043 Q. Is there any record in the proceedings of the Board of the Directors showing any suggestion or statement by you that the station should be disposed of, up to the year 1942?

A. By me?

3044 Q. Yes.

A. Except informally, as I told you, when the auditors were meeting here—I mean that I had that belief, and that was in August, 1941.

3045 Q. Did you make a record of that?

A. Not formally, no.

3046 Q. I am asking for a record, Mr. Newberry. Is there any record that you ever suggested or requested that the radio station be disposed of?

A. You want to know what the men said about it?

3047 Q. No, sir. A record in the minutes of the Board of Directors.

A. You won't find it there.

3048 Q. Is there any record that anyone made any suggestion that this station be disposed of, up to 1942?

A. Oh, yes.

[fol. 695] 3049. Q. A record?

A. In 1937 there was a record, I believe, empowering and authorizing the president to make attempts to make disposition of it, if he could do it advantageously to the Society.

3050 Q. You didn't tell the president that he should. You simply told him he could if he so decided?

A. I think I have it here. I don't remember. I think I have got it. That is as far back as 1937.

3051 Q. That is right. And at that time you told the president to make such disposition of the same as he may desire?

A. Yes.

3052 Q. You left it entirely to Mr. Bradsh-w?

A. Yes.

3053 Q. You didn't direct him to do it or even suggest that he do it?

A. Well, Mr. Stewart, there are so many things to do in Board meetings that we don't sit around and make speeches about anything.

3054 Q. You didn't have anything of much more importance than your radio station to consider, did you?

A. I think everything in connection with the institution is of more importance than the radio to us. Say it cost $800,000; our assets are $136,000,000. It is just one—it is less than 1/176th part of the gross assets of the Society. And there are many things, for instance, that needs our time.

3055 Q. Is there any single asset that anywhere near approaches the income on the investment than your radio station?

[fol. 696] A. Perhaps not, but I don't say it is the most important thing in the Society.

3056 Q. But it did bring the biggest return of any investment to the Society here, didn't it?

Mr. Crossman: That is objected to as having been asked and previously answered.

The Court: You may answer again.

Mr. Stewart: The question has been asked and there isn't any objection.

Mr. Crossman: Before Mr. Newberry answers that I should like to object to it.

Mr. Stewart: You have objected.

Mr. Crossman: Well, you have asked it again. I want to object to the apparent inconsistency. It seems to me the radio business is a business, and that a bond is an investment, and may I inquire of Mr. Stewart, with the distinction between the two, if he will separate them. I don't know whether you want it or not.

The Court: He can explain it, if he wishes.

3057 Q. Now, with the suggestion that was made, go ahead.

A. Well, of course, we don't regard that, Mr. Stewart, as we do our regular investments. If you just set it off against each other, an income or return was made, and in that sense call it an investment along with bonds of the states or the municipalities or utilities or government bonds. For the last few years it has made a good return on the amount that was [fol. 697] in it, to be sure.

3058 Q. How much was it, approximately?

A. Well, we have been writing down the installments, of course, each year. I have not just the latest figure on what we carry it as of the first of the year. I could get it for you.

3059 Q. Could you state that approximately?

A. Well, at the present time it is a million dollars, when it started, but that has been written down, that is, installments through the years.

3060 Q. Charged off?

A. Yes, through the years.

3061 Q. Was the investment as of the first of the year approximately $100,000?

A. Yes.

3062 Q. Approximately $200,000?

A. I would have to see the figures now to see what it is written down to, Mr. Stewart.

3063 Q. Will you supply that figure?

A. Yes, sir.

3064 Q. Mr. Newberry, again in March of 1942 you adopted another resolution in the Board leaving it to Mr. Bradshaw to negotiate and make a lease of the radio station, didn't you?

A. Yes, sir.

3065 Q. Are any of the men connected with the new company friends of yours?

A. One or two I personally know. I only met Thomas [fol. 698] Wallace here in the court room the other day, Mr. Stewart, and I met Guy Myers only one or two times around our office, stayed around there, maybe introduced by Mr. Bradshaw, and then the rest of them, Johnny Gillin and the rest of them, are good friends of mine.

3066 Q. Did you know that Guy Myers was representing the Consumers in its efforts to secure the Omaha power facilities for the Consumers Public Power?

A. I had heard that; I knew it as by hearsay. I never talked to him about it.

Q. 3067. Did you know it at the time that this lease in question was signed by you?

A. It was before that, yes.

3068 Q. Did you know at that time that Guy Myers was the largest investor in this new company?

A. I understood that he was a large investor, yes, sir.

3069 Q. I believe that is all, except that figure.

A. You asked me for the value now?

3070 Q. As shown by the books of the Society.

A. Yes.

3071 Mr. Wells: I will explain that Mr. Pakes has testified it has all been charged off.

The Witness: It has been charged off?

3072 Mr. Wells: And Mr. Pakes stated it had all been charged off.

Mr. Stewart: All right.

[fol. 699] The Witness: But you asked me if it was worth $100,000 now, and I will tell you it is.

Didn't you ask me if it was worth $100,000?

3073 Mr. Stewart: No.

The Witness: Didn't you ask me that?

3074 Mr. Stewart: You misunderstood me.

3075 Mr. Crossman: I have some questions on redirect examination, and I have a question on direct first.

Direct examination continued.

By Mr. Crossman:

3076 Q. Mr. Newberry, are you familiar with the broadcast that was made in connection with the fiftieth anniversary of the Society?

A. Yes, sir.

3077 Q. Do you know personally approximately how many radio stations were tied in on the network in connection with that?

A. Network and affiliated stations ran over one hundred.

3078 Q. What was the purpose of tying in this station on the network?

A. To get a complete hook-up so that the celebration ceremonies going over the air would be heard by as many auditors as possible throughout the nation.

3079 Q. And your members?

A. That is right.

3080 Q. Now, Mr. Stewart makes a point about owning this office building. Do you know that the Society pays taxes on that?

[fol. 700] A. It does pay taxes on it.

3081 Mr. Crossman: Now, a question on direct examination that I have, and I will have Mr. Johnson read that objection that Mr. Stewart made when I referred to the Consumers.

(Reporter reading as follows: "Mr. Stewart: That is objected to as not properly reflecting the petition in this case; the charges are that the Consumers are back of this.")

3082. Q. Now, I want to ask you this question on direct, and I want to call your attention to that objection, and I am indebted to Mr. Massey for this suggestion, and I read from Page 10, Paragraph 12, Sub-Division F of the petition: "Other persons whose names are unknown to plaintiff are interested in defendant Radio Station WOW, Inc. and in its operation of Station WOW, and in the benefits and profits therefrom; the obvious purpose of the leasing of the station as aforesaid is to make the radio station available to the Consumers Public Power District, and those interested in its acquiring such power facilities, spreading propaganda favoring such sale." Are you one of the other persons unknown, Mr. Newberry?

A. No, sir.

3083 Q. Will you lease this station, or will you procure its lease in order to enable the Consumers Power District to acquire it for propaganda purposes?

A. If there are such other persons, I am not one of them.

[fol. 701] 3084 Q. You are not one of them?

A. No, sir.

Recross examination.

By Mr. Stewart:

3085 Q. Mr. Newberry, do I understand that the Society pays taxes on the income that it receives from its office building?

A. No. Pays it on real estate; pays real estate taxes on it.

3086 Q. Not on the income?

A. No. The fraternal societies don't have to pay income taxes.

3087 Q. Do you devote all of your time to the Society's business?

A. Yes, sir.

3088 Q. And what is your salary?

A. $20,000.

Witness excused.

[fol. 702] W. Dale Clark, called as a witness in behalf of Defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

3089 Q. Please state your name, residence and occupation.

A. W. Dale Clark, Omaha, Nebraska; Banking.

3090 Q. With what bank are you connected, and in what capacity?

A. President, Omaha National Bank.

3091 Q. How long have you been connected with the Omaha National Bank?

A. Twenty-four years.

3092 Q. How long have you been its president?

A. Fourteen years.

3093 Q. In what capacity did you serve the bank previous to fourteen years ago when you became president?

A. Vice-president and assistant cashier.

3094 Q. For what period of time were you the vice-president and assistant cashier?

A. Well, if I were to guess at it, probably eight years as vice-president; several years as assistant cashier.

3095 Q. With what other business interests are you connected in the city of Omaha in any official capacity?

A. No business interests.

3096 Q. Are you a member of this Society?

A. Yes sir.

3097 Q. How long have you been a part of this Society?

A. It would have to be from recollection—it is quite a while.

3098 Q. How much insurance do you carry in the Society?
[fol. 703] A. A fairly substantial amount but I do not have that figure in mind exactly.

3099 Q. To refresh your recollection, if I can, haven't you been a member since 1920 and carried a total of $45,000 in the Society?

A. That is right.

3100 Q. I presume you have known of the Woodmen of the World Life Insurance Society having operated Radio Station WOW?

A. Yes.

3101 Q. Are you advised of the lease that has been made of that property recently to Radio Station WOW Incorporated?

A. Yes sir.

3102 Q. Did Mr. John Gillin make a loan in the Omaha National Bank with your approval for money to invest in this enterprise?

A. Yes sir.

3103 Q. How much?

A. It is my recollection it was $11,000, approximately that.

3104 Q. Did Mr. Bradshaw or any other member of the Board of Directors of the Woodmen of the World Life Insurance Society endorse or secure in any way that loan of the bank to Mr. Gillin?

A. No sir.

3105 Q. Did Mr. Bradshaw or anyone else request you to make such a loan to Mr. Gillin?

A. No sir.

3106 Q. How long was it you said you had been in business in this city?

A. Twenty-four years.

3107 Q. And fourteen years as president of the Omaha National Bank?

[fol. 704] A. Yes sir.

3108 Q. In that relationship have you been acquainted generally with the business interests in the city of Omaha for the last twenty-five years?

A. Yes sir.

3109 Q. Mr. Clark, on the basis of the assumed and proven facts in this action that Radio Station WOW, Omaha, operated under a construction permit and federal license from the Federal Communications Commission on

a frequency of 590 kilocycles with a power of 5000 watts day and night, and is a full time station with a coverage of approximately a million radio families; that the original cost of its present equipment was $175,000 which has been written off wholly or amortized by the owner; that there was no net operating income from 1923, the date of its installation, to 1935, inclusive; that the net operating income for 1936 was $137,904.00; 1937, $204,631.00; 1938, $174,169; 1939, $170,653.00; 1940, $181,032.00; 1941, $212,807.00; 1942, $287,437.00; that a fifteen year lease contract has been entered into between the Woodmen of the World Life Insurance Society and Radio Station WOW Inc., at a monthly rental of $8,166.00 for the first three years, $5,680.00 for the next twelve years of the lease, with an additional monthly rental income of $2,117.00 for space in its insurance building for the entire term of the lease; that the present worth of the monthly rental income for the radio facilities at a four per cent interest assump-
[fol. 705] tion is $855,972.82 and on a three per cent interest basis is $910,351.55; that the total lease and rental income for the radio facilities and space for the fifteen year term is $1,492,956.00, plus the interest on this monthly income; that the lease agreement requires the lessee to maintain said radio station in first class condition and to purchase and install at its own expense all necessary new and additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, to pay all city, county, state and federal taxes levied or imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; that at the end of the fifteen year lease lessee shall deliver and surrender possession of all the equipment that is then in use, and join in an application to the Federal Communications Commission for the transfer of the license back to the Woodmen of the World Life Insurance Society; that the Secretary of the Treasury of the United States in March of 1942 recommended a revision of the Federal Revenue laws so as to impose an income tax on the income from Radio Station WOW as a business not necessarily incident to the primary business of the corporation, and that legislation has been proposed in Nebraska imposing a tax not only on the

income from station WOW, but also on the gross contri-
[fol. 706] butions or premiums received by the Society from its members; that a bill was introduced in the Nebraska legislature prohibiting this Society from owning, maintaining and operating Radio Station WOW; that by reason of making said lease the officers of the Society would be relieved from the duties and responsibilities of administering the activities of said Radio Station WOW and thereby be enabled to devote their entire time to the business of insurance—on the basis of those facts what is your opinion as to whether or not the Board of Directors of the Woodmen of the World Life Insurance Society exercised sound business judgment in making this lease contract, and that the lease rental provides an adequate consideration for this station?

Mr. Stewart: To which the plaintiff objects as incompetent, irrelevant and immaterial, no proper or sufficient foundation laid, calling for a conclusion of the witness and conclusion of law that invades the province of the Court in this case, that is in issue that is before the Court and not the subject of expert testimony if the necessary qualifications were shown.

The Court: You may answer if you can.

A. It seems to me that it would be sound business judgment.

3110 Q. Were you advised of the contemplation by this Society of the disposition of this lease before it was made?

A. Not formally, no sir.

[fol. 707] 3111 Q. Informally?

A. Through only casual conversation with Mr. Bradshaw.

3112 Q. What was your opinion as to what action this Society should take, and for what reason?

A. Well, I previously expressed the opinion to Mr. Bradshaw that I thought the Society should dispose of the station at some time as soon as it could.

3113 Q. On what ground—for what reason?

Mr. Stewart: That is objected to as calling for hearsay evidence and immaterial.

3114 Q. Well, what were your reasons?

Mr. Stewart: Objected to as immaterial.

The Court: Objection overruled.

A. It is my belief that the business had grown to the point where it should either do one thing or the other, operate the life insurance company or a radio company, but could not properly do both.

3115 Q. You know nothing about the value of the station?

A. No sir.

3116 Q. You stated your opinion based on these facts as the opinion of a business man, president of the Omaha National Bank, and knowing the circumstances: is that your opinion as a member of this Society?

A. Yes sir.

Mr. Wells: That is all.

[fol. 708] Cross-examination.

By Mr. Stewart:

3117 Q. Mr. Clark, I understood you to say you knew nothing of the value of the station?

A. That is right.

3118 Q. Or of its rental value?

A. That is right.

3119 Q. Mr. Bradshaw is a director in your bank?

A. Yes sir.

3120 Q. Is the Woodmen of the World Life Insurance Society a customer of your bank?

A. Yes sir.

3121 Q. Approximately what amount of money does it carry on deposit in your bank?

A. I do not have any amount in mind but it is a substantial amount.

3122 Q. Well, can you give it roughly?

A. I think it is their main active bank account.

3123 Q. Well, is it as much as two million dollars?

A. I would not think it would average that.

3124 Q. Would it average over a million dollars?

A. I think so.

3125 Q. Were you one of the stockholders in the Globe Life Insurance Company that was organized by the officers of the Woodmen of the World Life Insurance Company about ten or fifteen years ago?

Mr. Wells: Objected to as immaterial and irrelevant.

[fol. 709] A. I don't think I was. I was a policy holder but I do not think I had any stock.

3126 Q. As I understand it, Mr. Gillin asked you for this loan of approximately eleven thousand dollars, and did you then inform him that he could have the loan or you would let him know later?

A. I told him he could have it.

3127 Q. Did you call Mr. Bradshaw about the loan?

A. Afterwards, yes sir, which isn't very good banking practice.

3128 Q. Well, Mr. Bradshaw evidently didn't tell you anything that would chill you on the loan, did he?

A. No sir.

3129 Q. Whatever he said about it was favorable to the loan?

A. Well, he did not say anything about it that I didn't now. I merely called him to ask him if there was anything I had not been aware of.

3130 Q. From what you were told of it you considered that the investment of that money in the new company would be a profitable investment for Gillin?

A. Well, I considered him a good risk for the collateral he was giving us.

3131 Q. When did you tell Mr. Bradshaw that you thought the station should be disposed of, about when?

A. Well, it was sometime in the summer, either July or August. I met him when I was out walking one evening, and I know it was in the summer time, whether July or August, I do not know.

3132 Q. This last summer?

[fol. 710] A. Yes.

3133 Q. He told you that negotiations were on?

A. He said they were thinking very definitely of getting out of it, yes sir.

Mr. Stewart: That is all.

(Witness excused.)

[fol. 711] R. E. Miller, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crossman:

3134 Q. Your name is R. E. Miller?

A. Yes sir.

3135 Q. Will you give us your residence, please?

A. 4817 California.

3136 Q. Omaha, Nebraska?

A. Omaha.

3137 Q. Are you connected with the Woodmen of the World Life Insurance Society?

A. Yes sir.

3138 Q. In what capacity?

A. Well, principally field manager or Promotion Director, also Treasurer.

3139 Q. Treasurer besides?

A. Yes.

3140 Q. Are you the Mr. R. E. Miller who is named as one of the defendants in this case?

A. Yes.

3141 Q. Sketch briefly your connection with the Society until you came to the Home Office?

A. You mean when I joined, and so forth?

3142 Q. Yes, briefly.

A. Well, I have been a member thirty-five years. I have [fol. 712] been in the field work, organization department, for about thirty years.

3143 Q. Where was that?

A. It started in Arkansas.

3144 Q. Where else did you go?

A. Oklahoma, and then to Texas and then here.

3145 Q. How long have you been connected with the Society at its home office here?

A. In the home office?

3146 Q. Yes.

A. In May, it will be five years since I came here. I have been a member of the Board ten years.

3147 Q. Before you came to Omaha?

A. Yes; I have been a member of the Board ten years.

3148 Q. Are you a member of the Auditors?

A. Not now; I was.

3149 Q. You were previously a member of the Board of Auditors?

A. Yes sir.

3150 Q. Have you been a member of the Board of Auditors since you came to Omaha?

A. Yes.

3151 Q. When did you cease to be a member of the Board of Auditors?

A. It is two years ago next month.

3152 Q. And did you fill a vacancy of that kind?

A. Senator Sheppard of Texas was the Treasurer; when [fol. 713] he died, I succeeded him.

3153 Q. Now, Mr. Miller, do you know of the lease of the radio station that was made by the Society to Radio Station WOW Inc.?

A. Yes.

3154 Q. Do you know of that lease?

A. Yes.

3155 Q. Do you have any information as to when the matter of some disposition of that radio station first came to the consideration of the Board of Directors, whether in formal meeting or informal discussion?

A. Probably in 1937 may have been the first time it was discussed in an official way, in an official meeting of the Board—however, among individuals informally, probably long before that.

3156 Q. Did you participate in those discussions?

A. Yes.

3157 Q. In the development of your views about what should be done, about when did you come to a conclusion, as a member of the Board, as to what ought to be done with the radio station—about when?

A. There was no development; I have always been that way; I didn't have to come to that conclusion; I have been that way since the radio started—never have been any other way.

3158 Q. Even before you became a member of the Board?

A. Yes.

[fol. 714] 3159 Q. Before you came upon the Board you had that view at that time?

A. I had that view at all times; never had any other view.

3160 Q. What were your reasons for that view?

A. Because I thought we should devote our efforts to fraternal beneficiary insurance and protection as custodians of the interests and welfare and protection of the members of this Society and all American homes, and we ought to consider that we have no time to devote to any other affairs even though we make a little money out of it, so I never have been in favor of fooling with the radio, not from the time it first started.

3161 Q. When, if you know, did the matter of the proposed lease, this lease that was made, when was that brought to your attention as a member of the Board of Directors?

A. You mean this present lease?

3162 Q. Yes, the one that was made.

A. Well, the meeting last fall.

3163 Q. In August?

A. In August or whenever it was—August, I guess.

3164 Q. Did you vote in favor of this lease?

A. Yes.

3165 Q. In arriving at your opinion as to what your duty was to the Society as a director and as a trustee for the interest of these members, did you later have any other reasons as to your opinion other than the fundamental [fol. 715] reasoning that the Society ought to devote itself to the Fraternal Benefit Insurance?

A. Well, any other reasons would be more or less incidental and were not necessary; I didn't need any other reasons than the one I gave, which I gave briefly and not fully, and I never did need any further reason; maybe other members of the Board did, but I didn't; I didn't know any other reason; I had little, in fact, paid little attention to any other matters that came up.

3166 Q. And is that the reason?

A. That is the reason.

3167 Q. Now, coming to the nature of this lease, Mr. Miller, and the terms of the lease, have you read it at one time or another?

A. Yes; I read it.

3168 Q. And are you generally familiar with its terms?

A. Yes.

3169 Q. With reference to the consideration that was to be paid, which Exhibit 13 discloses as $8166.00 per month for the first three years and $5680.00 per month for the

last twelve years, did the Board give consideration to those figures?

A. Yes.

3170 Q. And was it discussed at Board meeting?

A. Yes.

3171 Q. And did you give consideration to them?

A. Yes.

[fol. 716] 3172 Q. And was it your opinion that those figures, so far as the radio station lease was concerned, was a fair and reasonable consideration to the Society?

A. Yes.

3173 Q. After taking into consideration the lease of the station, did the Board of Directors also take into consideration concurrently the rental of this space occupied by the lessee?

A. Yes.

3174 Q. And did you take it into consideration?

A. Yes.

3175 Q. And Exhibit 14, which is the lease of the space, reflects that the consideration is $2117.23 a month for fifteen years; did you give consideration to that?

A. Yes.

3176 Q. And did you feel it was a reasonable and adequate return to the Society?

A. Yes.

3177 Q. And bundling the two together you felt that it was a good deal and voted for the deal, did you?

A. Yes.

3178 Q. Mr. Miller, there are some serious charges of fraud made against you personally about which I wish to inquire in this case. Dr. Homer Johnson charges you and Mr. Bradshaw, Mr. Newberry, Colonel Patterson, Mr. Ruess, Mr. Holston and Mr. Braden, under oath, and says [fol. 717] that shortly prior to September 1, 1942, the exact date being to Dr. Johnson unknown, you and all of you, in violation of your duties as officers of the Society and the trust reposed upon you, devised a plan to unlawfully procure for the benefit and profit of yourself, your friends and your associates the possession and control of Radio Station WOW for a grossly inadequate consideration. I should like to have you tell Judge Rine what the fact is concerning that.

A. You mean charged that it was profitable to us?

3179 Q. Yes, and particularly to you.

A. Well, it was of no profit to me, but I think it was extremely profitable to the Society.

3180 Q. Well, are you going to reap any profit out of it personally?

A. Oh, no; no.

3181 Q. Are you a stockholder in this lessee corporation?

A. No.

3182 Q. Have you any arrangement or plan whereby you are to acquire anybody's stock or any future issue of stock?

A. No.

3183 Q. Or have any interest or acquire any interest in the earnings of the stock?

A. No.

3184 Q. Or any bonuses or anything arising out of the operation of that corporation?

A. No.

[fol. 718] 3185 Q. Either openly or secretly? What do you say about that?

A. In no way whatever.

3186 Q. Now, when you testified that you believed that the lease would be for the benefit of the Society, you meant to the Society itself, or the compensation which it was going to receive, did you?

Mr. Stewart: That is objected to as leading.

Mr. Crossman: I will withdraw that.

3187 Q. I understood you on a previous question, Mr. Miller, to say that you believed that the lease was profitable, and I understood you to say profitable to the Society; is that what you said, in substance?

A. That is what I said.

3188 Q. Now, the charge is made against you, Mr. Miller, and your associates who live in Omaha, that in connection with this specific transaction you dominated and overruled the judgment of the non-resident directors of this Society and imposed your views upon them; what is the fact about that?

A. It is not so.

3189 Q. The charge is made in this petition that other persons whose names are unknown to Dr. Johnson are interested in defendant Radio Station WOW Inc., and in the

operation of station WOW, and in the benefits or profits therefrom, and under this belief, "the obvious purpose of the leasing of the station as aforesaid is to make the radio [fol. 719] station available to the Consumers Public Power District and those interested in its acquiring such power facilities for spreading propaganda favoring such sale." Do you know any of the other persons therein referred to whose names are unknown?

A. No.

3190 Q. Are you one of them?

A. No.

3191 Q. What consideration as a director did you give in voting for this lease as related to the acquisition of time for progaganda by the Consumers Public Power District over this station?

A. Not any.

3192 Q. When did you first hear of such a thing?

A. Well, not until this suit came up.

3193 Q. Now, the charge is made also, I think, that you are one of those who now dominate the stockholders, directors and officers of the lessee Radio Station WOW Inc.: what is the fact about that?

A. Not right.

3194 Q. Do you do so?

A. No.

3195 Q. Do you have any connection with those stockholders, directors and officers so far as their ownership and operation of this station is concerned?

A. Don't know any of them, don't even know them; several of them testified right here that they didn't know me. [fol. 720] 3196 Q. You are sort of the forgotten man, aren't you?

A. Yes.

Mr. Crossman: That is all.

Cross examination.

By Mr. Stewart:

3197 Q. Mr. Miller, you have always opposed, as I understand it, the Society operating the Radio station?

A. Yes.

3198 Q. Is there any record in the minutes of the Board of Directors of the Society of your opposition to the Society operating the station?

A. Probably not.

3199 Q. Is there any record, so far as you know, of anyone opposing the operation by the Society?

A. Maybe not in the official record, in the proceedings.

3200 Q. That is what I mean.

A. No.

3201 Q. And you said that even though the Society made a little money off the station, you think they ought to get rid of it?

A. Yes; I have always thought it and never had felt any other way.

3202 Q. Well, the Society made as much out of that station last year too as it made out of ten million dollars of its bonds, didn't it?

A. Yes, but I think the thing that would be worth in- [fol. 721] finitely more to the Society than the little money in that—our business is to make money for the members, yes, but that isn't our only purpose for operating—I think if we would get a little more new members—the best way to make money in this Society is to get more members, even double the membership, and when we do that we will be making plenty of money—you don't need to worry about that.

3203 Q. Well, don't you think the station has helped to advertise the Society?

A. No.

3204 Q. You do not?

A. No.

3205 Q. Don't you think the station has created good will for the Society?

A. Yes, the good will part is all right.

3206 Q. Don't you think the good will helps to secure members?

A. No, the net results—radio has not added any members, because while we may have some ten or twelve here in Nebraska as the result of it, we probably lose more than that because we were competing with other competitive radio stations; we couldn't expect these men running a competitive station to come over and join the Woodmen of the World when we had a competitive station; if it hadn't been for the radio station they would probably be in the Woodmen of the World now.

3207 Q. Then you don't believe the station has helped you?

[fol. 722] A. It hasn't hurt us; I don't believe that; it hasn't secured new members, that is what I am talking about.

3208 Q. Well, you said it hadn't advertised the Society: you don't agree with Mr. Bradshaw that it has advertised it?

A. It may have advertised it—it has advertised but not to the extent of increasing the membership materially.

3209 Q. Who does dominate the Board of Directors?

A. Who does dominate the Board of Directors?

3210 Q. Yes.

A. The membership.

3211 Q. Who dominated it with reference to the disposition of the radio station?

A. Who dominated the Board?

3212 Q. Yes.

A. There wasn't any domination there. We were simply doing what the members put us here to do, and that is try to make a good deal for them if we could, and we made a good one.

3213 Q. Well, you left it to Bradshaw as a member of the Board to decide whether the station should be disposed of, didn't you?

A. On the final disposition?

3214 Q. No, ever since 1937.

A. Oh, yes, yes, because he was most capable and honest and we thought he could take care of it.

3215 Q. And notwithstanding the fact that you and a number of other directors that you probably heard testify, stated that they thought the station should have been dis-

[fol. 723] posed of, for many, many years you did not at any time direct the disposition of the station, did you, Mr. Miller?

A. You mean me individually?

3216 Q. No, you as a director?

A. Well, I didn't become a director until ten years ago.

3217 Q. Well, during that time then?

A. From then on, no, I didn't say a lot about it in the Board; I didn't want them to think I was trying to dominate them.

3218 Q. You just left it to Mr. Bradshaw?

A. I just let them work it out.

3219 Q. And the other members left it to Mr. Bradshaw?

A. No, I didn't say I left it to Mr. Bradshaw; I left it to the other members of the Board; I figured some day they would get around to the way I thought, and if they did, all right, they would get rid of it.

3220 Q. Do you know Guy Myers was to be connected with the new company?

A. No.

3221 Q. Do you know Guy Myers?

A. Didn't know him until he was on the stand the other day.

3222 Q. Did you know he was to be the largest investor in stock in the new company?

A. I didn't know who had stock, who was to be the investors; I didn't care just so we got our money.

3223 Q. Did you know he represented the Consumers?

A. I don't know anything about the Consumers or the [fol. 724] Nebraska; I don't know one from the other.

3224 Q. Are any of the men in the new company friends of yours?

A. Harvey Milliken—I think he is one of them.

3225 Q. Any others?

A. I don't know any of the others.

3226 Q. Well, you know Gillin, don't you?

A. Well, yes, I know him. May I explain one reason why I maybe don't know more of these?

3227 Q. Yes.

A. Well, I have been here only five years and I am not in town much; the last few months I have been half the time or more out of the city and that is why I am not familiar with a lot of it.

Mr. Stewart? That is all.

(Witness excused.)

[fol. 725] Sterling C. Holston called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Crossman:

3228 Q. Your name is Sterling C. Holston?

A. Sterling C. Holston.

3229 Q. And you reside where in Omaha?

A. 5106 Izard Street.

3230 Q. Are you connected with the Woodmen of the World Life Insurance Society?

A. I am, Sir.

3231 Q. In what capacity?

A. As a member of the Board of Directors and as Assistant Field manager.

3232 Q. You are in Mr. Miller's department?

A. Yes; I am Mr. Miller's assistant.

3233 Q. How long have you been a director?

A. Since April 1, 1937.

3234 Q. Have you at any time been on the Board of Auditors?

A. No sir; I am not an auditor.

3235 Q. Now, you had some previous connection with the Society?

A. I became a member of the Society in February, 1926. I then started to work as a field man for the Society in Indiana, April 1, 1932. Six months later I was sent to West Virginia as Assistant State Manager of that state. A few months later I was made State Manager there. Two [fol. 726] years and three months later, on December 1, 1935 I was sent to California as Manager in California.

3236 Q. Have you ever been in Nebraska?

A. I am a native of Nebraska, Sir.

3237 Q. What town?

A. Trenton, Hitchcock County.

3238 Q. Out in the west end of Nebraska?

A. Right.

3239 Q. Well, coming down to this lease, when did you, as a director, first hear of a consideration as to what should ultimately be done with this radio station?

A. Mr. Crossman, I have heard it discussed off and on all the while since I became a director of this Society. So far as it being formally discussed in the Board I think it is shown in the minutes here that it was first in October of 1937 when a resolution was adopted.

3240 Q. Were you present at that meeting?

A. I was, Sir.

3241 Q. And has there been a discussion, formal within the Board and informal without the Board in outline generally concerning this station?

A. There has been.

3242 Q. When did you reach an opinion as a director and as a trustee for these members with reference to what the disposition ought to be?

A. As to the value of the radio, I came to a conclusion [fol. 727] before I was a director of the Society.

3243 Q. What was your conclusion?

A. During all the time that I had been a field man in Indiana and in my work in West Virginia and California, I had received no benefit whatsoever from our operation of the radio station. Speaking as a field man and interested in the particular mission of our Society, I had received no benefit, neither did the rest of my field men, to my knowledge. I felt this way about the operation of the radio station: with the utmost confidence in President Bradshaw and the executive officers of this Society, I just felt that as intelligent as he and as they are, they were not intelligent or capable enough to run two businesses at the same time. I considered the radio business separate and foreign to the operation of our Society as a fraternal legal reserve life insurance society. I felt that President Bradshaw and the other executive officers should give their entire time and attention to the affairs of the Society, and was jealous of any time which was spent in the conduct of the radio station.

3244 Q. Did you give any consideration in connection with your vote for this lease, to the tax questions?

A. I did, Sir.

3245 Q. What was your view about that?

A. May I state first of all I am no tax expert, of course, but I was advised by those in whom I had the utmost con- [fol. 728] fidence that the tax problem, of course, was a big one and some trouble probably was imminent. I knew from personal experience with our gross premiums that we were in danger of having our gross premium income taxed in some of the states. I considered those things from my own personal knowledge. I considered all the facts that had been presented over a period of time, and came to the conclusion that that was a very great factor in the disposal of the radio.

3246 Q. Were there any other major factors in forming your opinion?

A. Decidedly so. As stated, I want the entire time of the President and executive officers devoted to the promotion

of our real business, the legal reserve fraternal life insurance business.

Also, I have not been willing to concede nor do I concede at this time that we have ever received any great benefit from the operation of this radio station in this territory. If we have received any great benefit from the operation of it, the evidence would be here in the form of members. In checking our membership, the evidence is not there. Less than five percent of our members, as has been shown here, reside in this territory which is presumably covered by the radio station. When we check the production figures on new business, we find even less than that, I would say maybe as low as three percent; three to five percent of our new business is written in this territory presumably covered by this radio station. The evidence of its benefit from the [fol. 729] standpoint of goodwill and advertising just isn't there as I see it.

3247 Q. Now, in the discussion of this specific deal, were you advised with reference to the proposed prices that were to be paid?

A. I was, sir.

3248 Q. And did you take them into consideration in casting your vote for this deal?

A. I most certainly did.

3249 Q. Did you take into consideration the lease for the space in the building by the new corporation?

A. I did.

3250 Q. Was there a discussion of those questions and all related questions to the leases? Were you informed—was there a discussion of those facts among the directors informally?

A. There was a discussion, and I was informed.

3251 Q. And took that into consideration?

A. I did.

3252 Q. Mr. Holston, there are some personal charges against you. Are you familiar with the present bill pending in the legislature of Nebraska?

A. I am, sir.

3253 Q. With reference to taxation of premiums upon foreign firms?

A. I am, sir, with LB 344; it is here in evidence.

3254 Q. Have you conferred with any of the legislators [fol. 730] with reference to that bill?

A. I most certainly have.

3255 Q. And explained the position of the Society with reference to the same?

A. Yes, sir.

3256 Q. Do you feel that the passage of that bill would not be beneficial to the Society?

A. It would not be beneficial.

3257 Q. And you have expressed those facts, have you?

A. Yes, sir.

3258 Q. Now, I am not going into great detail because the general question, I am sure, is before you and before Judge Rine, but, Mr. Holston, you are charged here with acting fraudulently in lending your vote to the lease of this radio station, and you are charged in substance with making a profit, a secret and personal profit out of that transaction—what is the fact regarding it?

A. The charge is absolutely false in every respect.

3259 Q. Do you have any interest whatsoever?

A. I have not.

3260 Q. Either in stock or earnings, secretly or opening or contingently in future promise, anything of that kind?

A. None whatsoever.

3261 Q. Now, this could or could not be complimentary, the way you might look at it, but Dr. Johnson credits you [fol. 731] with ability and your associates, to completely dominate the Board of Directors of this Society: what is the fact about that?

A. He is wrong, sir.

3262 Q. And what is the fact as to whether or not you dominated them, you and your associates, in connection with voting this lease?

A. That is laughable; no attempt has been made, particularly not by me or anyone else to dominate the Board at any time, sir.

3263 Q. Do you feel you have been dominated?

A. I have not been dominated and I will not be.

3264 Q. Now, the charges made against you personally, and therefore, it is a serious question, that some persons unknown, in their vague form have conspired in some way to get this radio station out of the hands of the Society and into the hands of this new corporation in order to permit the Consumers Public Power District to acquire some advantage and use it for propaganda purposes in

order to enable the Consumers Public Power to acquire the properties of the Nebraska Power Company: what do you know about that?

A. I am not one of the unknown ones about whom the petition infers, and I know nothing whatsoever about the Consumers Power deal, certainly I know it has no connection with our leasing of the radio station; I do know that.

3265 Q. Did you take it into consideration in making this lease?

[fol. 732] A. I had no knowledge of it at the time the lease was made.

3266 Q. Did you ever hear it discussed as a factor—do you remember of it coming up to have it in this lease?

A. I certainly did not; never knew of it.

3267 Q. When did you first learn that charge had been made?

A. Here when the petition was first said, when this suit was brought.

Mr. Crossman: You may cross-examine.

Cross-examination.

By Mr. Massey:

3268 Q. It is charged that you and the other resident directors of the Life Insurance Society dominate and control the Board of the lessee company: what is the fact as to that?

A. Absolutely untrue; we have no connection in any way in that respect with the lessee company, none whatsoever.

3269 Q. Do you know whether any of your resident directors here do have such control?

A. Not to my knowledge; I am sure they do not.

By Mr. Stewart:

3270 Q. I understood you to say, Mr. Holston, that in your opinion the station hadn't been of any value in the production of business for the company, for the Society?

A. I have seen no evidence of it myself.

3271 Q. And have not since you have been connected with the Society?

[fol. 733] A. No, sir.

3272 Q. You do not agree then with the statement of President Bradshaw and his reports to the Board of Di-

rectors in the 1939 meeting, as follows: "The radio and our Woodmen magazine continue to be sources of inspiration and helpfulness in the production of business, by the carrying of news of our activities and advantages of our Society, to the various parts of the nation." I assume you didn't agree with it.

A. I agreed with it so far as the magazine is concerned.

3273 Q. But insofar as the radio is concerned?

A. He qualified it so far as to helpfulness and so forth—so far as any real benefit, I don't believe it has been.

3274 Q. You have felt that the officers of the Society were not capable of running both the station and the other business of the Society as I understand it?

A. Not only the officers of our Society, but I doubt really sometimes whether any individual is capable of running two businesses really and truly successful.

3275 Q. Well, when did you reach that conclusion with reference to your Society, Mr. Holston?

A. Perhaps not just exactly in that light all the while, but I have felt for a long time that our entire time and attention, and the attention of our president and officers should be toward the conducting of our real business, the business we started in fifty-two years ago.

[fol. 734] 3276 Q. Then you mentioned this tax threat as being imminent: how long do you feel that has been imminent?

A. Well, that would be a matter of guess. I do know there was a very serious attempt made in the State Legislature of California—I believe it was in the year 1935—just before I came to that state, however, but I know it was a fact.

3277 Q. And has it been continued since that time?

A. It has been continued more or less since that time, although no bill has been introduced in the legislature of that state recently, to my knowledge.

3278 Q. I believe you stated that you didn't consider the station was of any value as a creator of good will for the Society?

A. Mr. Stewart, that would depend upon the definition of good will. Perhaps I don't just exactly know the definition of good will. I think good will, so far as promotion of our Society is concerned, is in the story of one of our members who has contracted tuberculosis and returned

from our Sanatorium at San Antonio; I think of that as good will. So far as concerning me, I think of good will as the story that might be told of our members in times of flood and disaster. I think of those in terms of good will; I think of this as a matter of knowledge in operating a radio station.

3279 Q. Well, haven't the earnings of the radio station gone into the fund that helped keep your hospitals running?

A. They have gone into the general fund of the Society, [fol. 735] yes, in their small way.

3280 Q. Do you believe that this station has advertised the Society to its advantage?

A. It has advertised the Society undoubtedly; as to its advantage, I would question whether or not it is—probably has advertised more as just a radio station; they think of us sometimes as being in the radio business rather than being in the life insurance business.

3281 Q. Is there any record in the proceedings of the Board of Directors, Mr. Holston, of any request or suggestion on your part that the radio station be disposed of up to 1942?

A. Only a record of my approval of the resolutions.

3282 Q. And those are the resolutions that have been offered?

A. Yes; I know of no other record.

3283 Q. You voted in 1937 to leave the disposition of it up to President Bradshaw?

A. I voted on that resolution and it is here in evidence.

3284 Q. And you favored that resolution?

A. I favored it; yes.

3285 Q. And you voted again in March of 1942, to leave it to the President to dispose of the station if he so desired?

Mr. Crossman: I object to that; if he voted in favor of the resolution, when you interrogate him as to what the resolution shows, it speaks for itself.

3286 Q. Well, in substance, you voted for a resolution [fol. 736] that left it to the President, in March, 1942?

Mr. Crossman: That is more objectionable than your previous question; the resolution is in writing and in evidence here, and he either voted for it or didn't—interrogat-

ing him as to what happened when the written document is here and it speaks for itself.

3287 Q. Well, you did vote for that resolution?
A. I wouldn't know it until I saw it.

Mr. Crossman: Well, it should be Exhibit 7.

3288 Q. "After much discussion of the subject director R. E. Miller moved that the President be authorized to negotiate and make a sale of the property for the best price obtainable. Said motion was seconded by Director Braden and put and unanimously carried." That is March 5, 1942?
A. I voted in favor of that.
3289 Q. Do you know Guy Myers, Mr. Holston?
A. Not until he was here on the stand.
3290 Q. Did you know when this lease to the new company was being considered that Guy Myers was to be the largest investor in stock in that company?
A. No, sir.
3291 Q. Did you know at that time his connection with the Consumer deal?
A. I knew nothing about it.
3292 Q. Do you have any friends in the new company?
A. Yes, sir.
[fol. 737] 3293 Q. Who are they?
A. John Gillin and Harvey Milliken.
3294 Q. Any other?
A. No, sir.
3295 Q. In answer to Mr. Crossman's question, you said that—I believe I am right—that you didn't dominate the Board of Directors: did anybody dominate the Board of Directors?
A. Certainly not.
3296 Q. Did anyone dominate it with reference to the disposition of the radio station?
A. No.
3297 Q. You simply left that to Mr. Bradshaw to dispose of?
A. We did as the resolution shows.
3298 Q. Yes. You always favored the Society getting rid of the station, didn't you?
A. I don't understand you.

3299 Q. You always favored the Society getting rid of the station, didn't you?

A. I have, sir, since it has been discussed.

3300 Q. But under the deal that has been made the Society still owns it, doesn't it?

A. Still owns it; we are the lessor.

Mr. Stewart: That is all.

(Witness excused.)

[fol. 738] 3301 Mr. Wells: Judge Rine, I will now read the deposition of Mr. Horace Erickson.

3302 The Court: You offer the deposition in evidence?

3303 Mr. Wells: I offer the document in evidence.

3304 The Court: What is the exhibit number of that?

3305 Mr. Wells: Well, it is a deposition that was filed March 1, 1943.

Mr. Stewart: Mr. Wells, the plaintiff objects since it is not shown that Mr. Erickson is absent from the city of Omaha.

3306 Mr. Wells: Oh, I beg your pardon. My knowledge about that, Your Honor please,—at noon I called his office and the secretary told me that he was out of the State and would not return to the city until the 15th of March; that is my information.

3307 Mr. Stewart: Well, that is not testimony, but I will accept your statement on that.

3308 Mr. Crossman: Of course, his statement is much more cogent than testimony.

3309 The Court: If that is not satisfactory I will send the Sheriff after him.

3310 Mr. Stewart: Well, that is satisfactory, but you might send the sheriff after Mr. Crossman; he made some remark after I had agreed to it.

Thereupon counsel read in evidence from the deposition of A. Horace Erickson as follows:

A. Horace Erickson of lawful age, being by me first duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows, viz.:

Direct examination.

By Mr. Wells:

3311 Q. Please state your name, residence and profession or occupation.

A. Albert Horace Erickson; 400 North Elmwood Road; Flour business.

3312 Q. With what businesses are you connected and what official capacity have you in those businesses?

A. The only business I am connected with is Kelly-Erickson Company, sole owner.

3313 Q. Do you know the radio station WOW in Omaha?

A. Yes.

3314 Q. Have you ever had any negotiations within the past few months concerning the purchase or lease of this radio station?

A. Yes.

3315 Q. With whom did you have those negotiations?

A. With Mr. Bradshaw.

3316 Q. Did you negotiate for a purchase or a lease?

[fol. 740] A. I talked to him about both purchase and a lease.

3317 Q. Are you familiar—in those negotiations did you learn about the earning capacity in the past five or six years of the radio station WOW?

A. I had the figures; I don't recall what they were—of the operations.

3318 Q. Income and expenditures and the net?

A. Yes.

3319 Q. What price was made to you as to the sale of that radio station?

A. Eight hundred fifty thousand dollars on cash price was the least he talked to us about it.

3320 Q. Did you make a thorough investigation of that proposition?

A. Yes.

3321 Q. What was your judgment as to whether that was an adequate price for that station or not?

A. We told him it was too high so far as we were concerned, because there was only a year's lease attached to it.

3322 Q. What do you mean by a year's lease?

A. The Radio Commission will only give you a year's license.

3323 Q. And you declined to invest in it at that price?

A. At that price. We talked to him in regard to buying it for less money, that we would give him a cash offer for less money, but he wouldn't——(interrupted).

3324 Q. But you never gave him any cash offer?

A. We would have but he stopped us; he stated he was not interested.

3325 Q. What was the cash offer you had in mind?

[fol. 741] A. We would have paid six hundred thousand dollars, between six hundred thousand dollars and six hundred fifty thousand dollars for it.

3326 Q. Who was interested in it with you?

A. Clarke Swanson.

3327 Q. What date was that, Mr. Erickson?

A. I can't recall the exact date; sometimes this past summer; about the middle of the summer, I would say.

3328 Q. After you couldn't reach an agreement for a purchase did you then negotiate concerning a lease?

A. We did.

3329 Q. What was the lease price, the rental for which he offered it to you, do you recall, approximately?

A. I don't remember the exact figures but it was a little bit more than we wanted to pay, because in our discussions with—wait a minute now—that isn't correct. In our original discussions with him, he gave us a less offer or indicated he would consider a less price and that price was of interest to us. When it came back to renegotiating it he raised his ideas something over one hundred fifty thousand dollars.

3330 Q. From the original?

A. From the original, that he indicated he would be interested, without giving us a definite figure. In other words, we talked to him about a figure at that time that we might be interested in.

3331 Q. What was that figure?

[fol. 742] A. I don't remember definitely; I would not be able to give you the definite figure.

3332 Q. When reduced to the present worth can you approximate what the present value of the rentals would amount to over the term of the lease?

A. We talked about a different lease entirely than what you people have; ours was on a twenty year basis.

3333 Q. Well, when reduced to present worth, the rental, if you confine yourself to that, would the present value be approximately six hundred fifty thousand dollars?

A. On a lease basis?

3334 Q. Yes.

A. No. No; ours was on a higher basis than that; our lease basis was on a substantially higher figure than the cash offer of purchase.

3335 Q. If paid on a monthly basis?

A. If paid on a monthly basis, yes.

3336 Q. When you considered the purchase under consideration did that contemplate continued occupancy of the station in the building where it is now located?

A. That was our only reason for being willing to make the cash offer we did, because we would have moved the station out of there and saved a very substantial saving of what they pay at the present time in rental. We could have operated that station with savings of rental at least pretty close to twenty thousand dollars a year.

[fol. 743] 3337 Q. Have you ever seen the lease that was made, that is now in force for the Radio Station WOW Inc.?

A. No. I saw the lease at the time that we were considering it, but I don't know how that compares with this lease.

3338 Q. Suppose this lease ran for a term of fifteen years with a rental monthly for the first three years of $8166 and for the remaining twelve years $5680, and to pay a rental of approximately $2200 a month for the space now occupied: on that basis would you think that the price was a fair and adequate price that we received for it?

A. It is more money than I would pay for it; if it was not, we would have been interested because we had an opportunity of meeting that price.

3339 Q. About when were you negotiating about the lease?

A. August or September.

3340 Q. You say you had the opportunity of taking it on those terms and declined to do so?

A. That is correct.

Mr. Wells: You may cross-examine.

Cross-examination.

By Mr. Massey:

3341 Q. Mr. Erickson, had you become a lessee, did you contemplate moving to other quarters or staying in the building?

A. Now, just a minute: as a lessee under the terms of that lease, we would have had to stay there; as an outright purchaser we would have moved the station.

[fol. 744] 3342 Mr. Massey: That is all.

3343 Mr. Stewart: I will read at the top of page 10 of the cross examination.

3344 Mr. Wells: You are going to skip pages 7, 8 and 9?

3345 Mr. Stewart: Yes.

Thereupon counsel for plaintiff read as follows:

3346 "Q. You were prepared to pay the amount of your offer which I believe you said was six hundred fifty thousand dollars?

A. That is correct.

3347 Q. And Mr. Bradshaw turned that down?

A. Correct."

3348 Mr. Stewart: And next on page 11—no, at the bottom of page 10, the last question:

3349 "Q. Were you asked to participate in the new company that leased the station?

A. Yes.

3350 Q. Did you agree to do so?

A. I did not.

3351 Q. Not at any time?

A. No.

3352 Q. Did Mr. Swanson, so far as you know?

A. I am not familiar—yes; I know he was asked to participate; he stated so.

Mr. Stewart: I believe that is all."

3353 Mr. Massey: I offer the next question and answer.

3354 "Q. Mr. Erickson, do I understand that if you became a lessee you were insisting that the Society pay for any equipment necessary for television?

A. Correct."

Mr. Massey: That is all.

3355 Mr. Wells: We want to offer that part of the cross-examination by Mr. Stewart, which was omitted by him, [fol. 745] commencing at the beginning of the cross-examination on page 7:

"By Mr. Stewart:

3356 Q. Mr. Erickson, you said on a lease basis you would have paid substantially higher than a cash offer of six hundred thousand or six hundred fifty thousand dollars?

A. That is right.

3357 Q. What do you mean by substantially higher? Can you give us a figure?

A. No; I would not give you a figure without refreshing my memory as to what we had in mind, the exact figure we had in mind that we did talk to Bradshaw about.

3358 Q. Well, I don't care for the exact figure—substantially—do you mean fifty per cent more?

A. Oh, no.

3359 Q. Twenty-five per cent more?

A. We probably would have considered that, yes, twenty-five per cent more.

3360 Q. I presume you read in the newspapers of the provisions of this new lease that was made?

A. No; I haven't.

3361 Q. You said you had an opportunity of meeting the price that was made: why didn't you meet that price?

A. Because it was too high a figure for us; the reason we didn't meet it is because television is coming in; that would be an outlay of two hundred seventy-five thousand dollars additional into this plant in order to take care of television; otherwise we would have made a deal for this [fol. 746] plant, or if the Woodmen of the World would have been willing to put television in and charge us rental on the same rental basis.

3362 Q. They offered to do that?

A. They would not; we asked them if they would do that, and we would make a deal with them.

3363 Q. And they declined?

A. They declined.

3364 Q. The income taxes that you would have had to pay as operators of the station entered into your decision?

A. Oh, yes; it did.

3365 Q. In what way?

A. It did on a cash purchase deal because we couldn't afford to pay eight hundred fifty thousand dollars for that on the basis of that present tax rate.

3366 Q. What part of the net income of the station did you anticipate you would have paid in the way of income taxes?

A. We had a different proposition in mind; we were going to build this up into a partnership arrangement, and taking in the members of the family so we would have been able on that kind of operation to establish substantial savings in the taxes; otherwise we couldn't have offered to pay six hundred fifty thousand dollars.

3367 Q. Approximately what taxes would you have had to pay under the plan you were contemplating?

[fol. 747] A. We would all be in that tax because we would operate it as a partnership and not as a corporation.

3368 Q. Well, did you figure what the individuals would have to pay, approximately?

A. Well, if you spread it over a period and some of them that are not in any income bracket at the present time, the individuals would have had to pay a much lower tax rate; that is where the savings would come; that is the only reason we could pay six hundred fifty thousand dollars.

3369 Q. Did the tax rate enter into your refusal to lease the station?

A. No.

3370 Q. Why didn't that affect your consideration of the lease?

A. Why should it affect it, the lease? We were not putting the money up; we would not have had the capital set up to start with.

3371 Q. Did you make any offer on a lease basis?

A. Yes; we did make an offer on a lease basis.

3372 Q. Do you now recall what that offer was?

A. I do not.

3373 Q. Or approximately?

A. No. It was a little less than the present.

3374 Q. Who was associated with you in the proposed purchase and leasing of the station?

A. Clarke Swanson.

3375 Q. Anyone else?

A. No.

[fol. 748] 3376 Q. You were expecting, as I understand, to take in members of your family?

A. Yes; that is correct, and Clarke was going to take his brother in and members of his family.

3377 Q. Were all of your dealings with Mr. Bradshaw?

A. Yes, sir, and Mr. Gillin.

3378 Q. Who first talked with you about it?

A. Mr. Gillin.

3379 Q. You said that Mr. Bradshaw revised his ideas over one hundred fifty thousand dollars: in what way, Mr. Erickson?

A. Upward.

3380 Q. What was the revision, from what figure to what figure, approximately?

A. I can't give you the exact figure as to what the revision was from.

3381 Q. As I understand, that was with reference to a lease?

A. With reference to a lease.

3382 Q. And you have no recollection of the approximate amount of rent that he asked in the first instance?

A. Yes; he talked about the same rate of rent that the WOW station was paying at that time."

3383 Mr. Wells: That completes the deposition.

3384 Mr. Massey: Now, may I read that last question again so that the court can see——(interrupted).

Mr. Stewart I object to that; it has been read once; I [fol. 749] don't propose to read mine the second time.

Mr. Massey: My answer pertains to something that had not been read until after I read my answer:

3385 "Q. Mr. Erickson, do I understand that if you became a lessee you were insisting that the Society pay for any equipment necessary for television?

A. Correct."

3386 Mr. Crossman: The defendant, Woodmen of the World Life Insurance Society and the seven individual officers and directors now offer in evidence the deposition of Niles Trammell, which was taken in New York City on January 19, 1943, commencing on page 19 and reading all of it.

Thereupon counsel read the deposition of Niles Trammell, as follows:

"NILES TRAMMELL of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows:

Direct examination.

By Mr. Wells:

3387 Q. Mr. Trammell, please state your name, residence and profession or occupation.

A. My name is Niles Trammell. I reside in New York City at 340 Park Avenue, and I am President of the National Broadcasting Company.

3388 Q. State what position or positions you hold with [fol. 730] other business organizations with which you are connected, if any?

A. Well, I am Chairman of the Executive Committee of the Blue Network. I have no other business organization relationship.

3389 Q. Approximately how long have you held these relationships?

A. I have been President of the N. B. C. since June 1940—I think that is the date,—yes, June, 1940. Prior to that time, for a period of a year and a half I was Executive Vice-President of the company, and then since—June 1928 and the time that I was Executive Vice-President of the company, I was in Chicago in charge of the Social Division,—and I was the Vice-president of the company, from, I think, 1929 until the time I was made Executive Vice-president. Prior to that time I was associated with the Radio Corporation of America. I joined the Radio Corporation of American in April, 1923.

3390 Q. Approximately for what length or period of time have you been connected with the broadcasting—radio broadcasting industry?

A. Well, I have been in radio since April, 1923. My activities in the Radio Corporation were primarily in connection with sales of receiving sets and transmitters. I joined the National Broadcasting Company in March, 1928, and have been in the broadcasting business since that date.

3391 Q. Does National Broadcasting Company own and operate individual broadcasting stations?

A. Yes, we do. At the present time the National Broadcasting Company owns and operates WEAF in New York, WRC in Washington, WTAM in Cleveland, WMAQ in Chicago, KOA in Denver and KGO in San Francisco—the blue network.

[fol. 751] 3392 Q. What power does each of these stations have?

A. They all have 50 kilowatts of power with the exception of WRC in Washington, which has a power, as I recall, of 5,000 watts, day and night.

3393 Q. Have you actively participated in the sale, leasing or purchasing of radio broadcasting stations?

A. Yes, I was in on the purchase of WMAQ in Chicago from the Chicago Daily News, and on the purchase of WENR from the Insull group in Chicago, and the purchase of the General Electric stations KGO in San Francisco and KOA in Denver. I might add that, so as to not confuse the record, that KGO in San Francisco, WENR in Chicago and WJZ in New York are presently owned by the blue network, but prior to separation those stations were also owned by N. B. C.

3394 Q. Have you had knowledge of the sales and leases generally throughout the United States of broadcasting stations other than those with which you have been directly connected?

A. Well, yes. On the sale of any station throughout the United States, it becomes a matter of record in the Commission and then becomes an item of note in the trade press, and they usually give, of course, the price that is paid. Sometimes that price is estimated; other times, it is a definite price which is taken from the records of the Commission.

3395 Q. Do you know the power, the frequency, the general coverage and general reputation of Radio Station WOW in Omaha?

A. Yes, I am very familiar with it.

[fol. 752] 3396 Q. On the basis that radio station WOW, Omaha, operates on a frequently of 590 kilocycles, with power of 5,000 watts day and night and is a full-time station with a coverage of some million radio families or some four million people according to the U. S. census of 1940 and that retail sales are approximately one billion three hundred million dollars; and that the cost of the present

equipment originally of said radio station WOW was $175,000 with approximate present value of $75,000 which has wholly been written off or amortized by the owner, and there was no operating net income from 1923, the date of its installation, until 1935, inclusive; and that the net operating income for 1936 was $137,904, 1937 $204,631, 1938 $174,169, 1939 $170,653, 1940 $182,032, 1941 $212,807, 1942 $278,307; and the last two years, 1941 and 1942, it paid no price to ASCAP for ASCAP music which it had previously paid annually of more than $20,000, before depreciation charges deducted; and that a fifteen-year lease contract has been entered into between Woodmen of the World Life Insurance Society and Radio Station WOW, Inc. at a monthly rental of $8,166 per month for the first three years, $5,680 per month for the next twelve years of [fol. 753] the term of the lease and the present worth of the fifteen-year rental on a four per cent interest basis is $855,000 and on a three per cent basis $910,000; and the agreement by the lessee to maintain said radio Station WOW in first-class condition and to purchase and install at its own expense all the necessary new and additional equipment, machinery, and devices to enable it to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, or any other Federal Government agency, and to pay all city, county, state and federal taxes levied or imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; and at the end of the fifteen-year lease to deliver and surrender possession of all of the equipment then in use and join an application to the Federal Communications Commission for the transfer of the license back to the Woodmen of the World Life Insurance Society, and that the said lease, contract and assignment of radio station license for radio Station WOW from the Woodmen of the World Life Insurance Society to radio Station WOW, Inc. has been approved by the Federal Communications Commission—on the basis of those assumed facts, is it your opinion that this rental—lease rental for a period of fifteen years is an adequate consideration for this station?

A. I feel that it is more than an adequate consideration for this station in view of the anticipated taxes that will be required of the new owner. Even without the tax consideration, it is an adequate consideration in view of the

hazardous nature of the business of broadcasting, the probable developments in the future, and the necessity on the part of the new owners to maintain the equipment and to install the new developments as they come along, such as frequency modulation and television.

[fol. 754] Mr. Gillin spoke to me, I think in February or March of 1941, about his anticipated purchase at that time of WOW—1942 I guess it was—yes, 1942. At that time we didn't go into any of the details, but in May—maybe it was April, a month later, he told me that he was anticipating to get a group together to purchase the station for approximately $800,000.

I told him at the time that I felt that was an unusually high price for the station. That we had just recently purchased from the General Electric Company a fifty kilowatt station in Denver and a seven and a half kilowatt station in San Francisco which could be put up to fifty kilowatts for a purchase price of around $900,000. We got both of the stations for that price. And while the earning record of WOW was very good that he had no assurance that the earnings record would continue at its present levels because of the War conditions and, secondly, these earnings were based without considering the taxes that would have to be paid by the new company.

Particularly that was something that should be seriously considered because WOW under its past operations had not been privileged to establish a tax base for consideration of future income, and that unless some special concessions could be received from the Treasury Department, that most of its income that it had been currently enjoying would be all taxed.

May of last year, I saw Mr. Bradshaw in Florida, Miami—and told him approximately the same—that I felt that he should let Mr. Gillin have the station cheaper—for a less price than $800,000, because I didn't see how the new owners could possibly pay out on that investment. He wanted to know if the National Broadcasting Company would be willing to loan the new owners a sum of money to get [fol. 755] started, and I told him we would take it under consideration, we would like to be helpful if we could.

I came here to New York and put my tax people on the problem, and as I recall these figures—and I am speaking now from memory—we estimated that if the station con-

tinued to earn on its present basis and if they had to pay the taxes as we anticipated them in May of last year, that the station wouldn't probably earn net more than $50,000—fifty or $60,000—and that on that basis it would take them sixteen years to amortize the $800,000 proposed purchase price, and with that in mind I told Mr. Gillin and I believe Mr. Bradshaw that the National Broadcasting Company couldn't participate in any financial assistance to the new owners.

Mr. Wells: You may examine."

Thereupon the cross-examination was read by Mr. Stewart, as follows:

"Cross-examination.

By Mr. Stewart:

3397 Q. Mr. Trammell, how long have you known Mr. Gillin, approximately?

A. I would say a minimum of ten years. I don't know whether I have known him longer than that. I may have known him ever since I have been in the broadcasting business but they had a man by the name of Styles—Orson Styles—running the station prior to Mr. Gillin, and I don't recall the exact dates that the two of them—that Mr. Gillin took over the management of the station. I knew Mr. Gillin, as I recall, when he was working on the station under Mr. Styles.

3398 Q. What has been the nature of your acquaintance with Mr. Gillin?

A. He has been the Manager of this station, and our relation has been one that we normally have with our independent affiliated stations. He accepts or rejects the programs that we offer him and from time to time we have negotiated affiliation contracts with Mr. Gillin and Mr. Bradshaw and his other associates.

[fol. 756] 3399 Q. Are you connected with any organizations with which Mr. Gillin is connected, other than N. B. C.?

A. Why, I think—of course, N. B. C. is a member of the National Association of Broadcasters, and I believe that Mr Gillin's firm, Woodmen of the World, are also a member of the National Association of Broadcasters. Certain committees Mr. Gillin has been on, and I think that I served

on certain of those committees—I don't recall—from time to time.

3400 Q. How long have you known Mr. Bradshaw, approximately?

A. I think—I imagine about eight, nine, ten years.

3401 Q. What has been the nature of your acquaintance with Mr. Bradshaw?

A. On my visits to Omaha I would always see him. Occasionally on his visits to New York and Chicago, I would have the pleasure of seeing him and discussing broadcasting generally and the relation of WOW and the National Broadcasting Company in particular—and I went out to Omaha when I was in Chicago some four or five years ago and negotiated an affiliation contract with Mr. Bradshaw.

3402 Q. Have your dealings in connection with the management and operation of Station WOW been generally with Mr. Gillin or Mr. Bradshaw?

A. Mr. Gillin primarily; occasionally with Mr. Bradshaw, but most of our relationships have been with Mr. Gillin.

3403 Q. I presume you are testifying here today at the request of Mr. Gillin?

A. I think it was Judge Wells that asked me to testify.

Mr. Wells: That is right.

3404 Q. And I assume that you aren't receiving any compensation for testifying here?

A. No.

3405 Q. Simply as a favor to Mr. Gillin?

A. I don't know whether it is a favor to him; I am testifying at his request.

3406 Q. Complying with his request.

[fol. 757] A. Judge Wells' request.

3407 Q. Did you have an opportunity to examine the long question which Mr. Wells read to you concerning the lease?

A. No sir.

3408 Mr. Wells: Never saw it.

The Witness: No, sir.

3409 Q. I presume that you knew that the reasonableness of the rental provided for that lease was involved in litigation in Nebraska?

A. I did. I read it in the trade paper.

3410 Q. And that the Woodmen of the World Life Insurance Company claimed that it was a reasonable rent?

A. I think it is more than reasonable for what the new owners are going to get out of it on the basis of other radio stations—comparatively with other radio stations.

3411 Q. What has been the standing and reputation of the station?

A. It has been excellent—excellent.

3412 Q. Does that apply also to the management?

A. The management is splendid.

3413 Q. Has the operation and management of the station been entirely satisfactory to N. B. C.?

A. Definitely. I will say under Mr. Gillin's ownership and management, it will continue to be so.

3414 Q. Can you state approximately how long WOW has been affiliated with the N. B. C.?

A. When I joined the National Broadcasting Company in 1928, it was my recollection that they were an affiliated station at that time. I imagine they were one of the first stations to become affiliated with the company when they extended the lines west of Chicago.

3415 Q. WOW is one of the stations that is associated with N. B. C. in the litigation involving the recent rules of the Federal Communications Commission relating to networks?

[fol. 758] A. That's right.

3416 Q. Is there any other station that is associated with N. B. C. in that litigation?

A. Yes, WHOM, in Rochester, New York, owned by the Stromberg-Carlson Television Company.

3417 Q. Is that station a member of the N. B. C. network?

A. Yes.

3418 Q. Mr. Trammell, you said you talked with Mr. Bradshaw in May of 1942 concerning a sale of WOW. Had you talked with him on any previous occasion to that concerning the sale of the station?

A. No.

3419 Q. Or a lease of the station?

A. No.

3420 Q. Did Mr. Bradshaw at that time give any reason as to why the Woodmen of the World Life Insurance Society desired to dispose of its station?

A. He told me that it was taking entirely too much time of the officers of the Woodmen of the World; that he found he and his associates were devoting certain of their time—

a considerable amount of their time to the station, and that he had come to the conclusion that it wasn't wise for an insurance association of the type of the Woodmen of the World to own a broadcasting station.

3421 Q. Do you recall any other reason that he gave you why they should dispose of their station?

A. This is something that—I am speaking purely from memory and I—I believe that there was certain regulatory activities on the part of the Government so far as radio was concerned that he felt might impinge on the activities of the Woodmen of the World. I think that he said that. I am not positive on that subject. We had this conversation that lasted a couple of hours—two hours and a half. I was just recovering from a rather severe illness. There may have been things that we discussed there that I don't recall at this moment.

3422 Q. Did you have any subsequent conversations with [fol. 759] Mr. Bradshaw concerning lease or sale of the station?

A. I think that the only other conversation that I had with him—and this is something that I am not positive about—this was at the request of Mr. Gillin, at the time I told Mr. Gillin that we could not be of assistance in financing the purchase, he asked me to telephone Mr. Bradshaw that, and I did on long distance call and I explained to Mr. Bradshaw why we felt that the purchase price of $800,000 and the fact that according to our tax experts it would take sixteen years to amortize that amount, that we could not participate or assist Mr. Gillin in the purchase of that station.

3423 Q. Those are the only two conversations?

A. The only two that I recall.

3424 Q. Yes—and at the time that Mr. Bradshaw first talked to you, they were already negotiating with Mr. Gillin for a sale?

A. Yes, any group that Mr. Gillin would get together.

3425 Q. Yes. Was your company ever approached concerning a lease or a purchase of the station?

A. No, sir. We wouldn't have been interested if we had been because of the asking price that he had put on the station of $800,000.

3426 Q. You said, I believe, that the tax problem made it difficult for the company to earn enough to pay for this

station, and I presume that is the reason why you mention your company would not have been interested?

A. That's true—and then another consideration—it was never offered to us. Had it been offered to us, there would have developed a question in our mind as to whether the Federal Communications Commission would have approved a transfer or the leasing of the station to the National Broadcasting Company.

3427 Q. Did you ever make any effort to find any purchaser or lessee for the station?

A. I was never asked to.

[fol. 760] 3428 Q. Are you acquainted with Guy Meyers?

A. No, sir. Is he the man who has something to do with the utility business out there?

3429 Q. That's right.

A. I read about him in the trade press.

3430 Q. You don't know him personally?

A. No.

3431 Q. You perhaps know that it has been claimed that the station is being acquired by a group other than Mr. Gillin that are interested in the acquisition of the power facilities in Omaha by the Consumers Public Power District, and that the station is to be used in promoting that sale. If that were true, would you consider the use of that station for that purpose as a proper use?

A. I certainly would not, because if it is a controversial issue then the management of that station, if they operate in conforma-ce with normal policies in the broadcasting business, would be required to give equal opportunities to both sides for the discussion of this subject. I believe the Nebraska Power Commission is a pretty good advertiser on WOW at the present time, isn't it?

3432 Q. I believe it does some advertising. Back to the tax question again. I believe it was included in Judge Wells' question that the station, the net earnings were approximately $270,000 in 1942, and you said that the net after payment of taxes by the new company would be about $50,000 or $60,000.

A. I think the figure that we were working on in May of this past year when I made that—we estimated that it would be $50,000 or $60,000—we were using the 1941 figures of $212,000.

3433 Q. So on the basis of the 1942 earnings of the company, why the net after payment of taxes would be somewhat in excess of $60,000?

[fol. 761] A. I wouldn't know under this new tax law. I doubt it very much. I think it would be less.

3434 Q. Under the present tax law, does N. B. C. get into the highest bracket?

A. That I can't answer. I think that we do. I know that our taxes this year are substantially more than they were last year and we are in the excess tax brackets. What that is, I will have to let you subpoena someone else in the tax section to answer that. I don't know whether we are in the highest bracket or not. If we aren't, we are so close to it, that it doesn't make much difference.

3435 Q. In stating that the rental provided in this lease was in your opinion reasonable, did you consider the ability of the lessee to pay that rental over the period of the lease? Did you take that into consideration?

A. I don't know that—I can't answer that, because I don't know that I ever gave that any thought. I assumed that they would be able to make their lease payments but so little would be left for the owners of the station that we couldn't see our way clear to consider it. At the time we were making these calculations, it was supposed to be an outright purchase, rather than a leasing arrangement. The leasing arrangement was something that developed subsequent to our refusal to be of assistance to the new purchaser.

3436 Q. And so, when you stated that the lease rental provided in this lease was in your opinion reasonable, you were assuming that it amounted to a purchase at the present value of that rental according to the figures that Mr. Wells gave you—the present value, I believe he said, of $855,000 or a four per cent basis?

A. I don't know that I understand this question, but may I state it in my way and you correct me if I don't understand the question: The present leasing arrangement on a four per cent basis will net the Woodmen of the World [fol. 762] $855,000 during the period of the lease; on a three per cent basis it will net them $910,000—and your question to me—Is that a fair return for the station in lieu of a purchase price?

3437 Q. Is that figure—is one of those figures that he has given?

A. I would say that it is a very fair figure, because I think it is going to be most difficult for the purchasers to make any substantial profits out of the operation of the station.

3438 Q. Of course, if this lessee wasn't able to make those payments, or if there was doubt about the ability of the lessee to make those payments, I presume it would affect your opinion, would it not, as to the reasonableness of the rent provided in the lease?

A. In other words, you don't think this is a good loan?

3439 Q. I mean if there is a question about the ability of the lessee to pay that rent over the period of the lease.

A. I don't think but that there is any question that they will be willing to make those payments.

3440 Q. Willing and able to?

A. Oh, yes. I will say this—in the broadcasting business, it is a very hazardous business. We are dependent on the status of national advertising. We are dependent on the renewal of licenses by the Commission, and we have to take into consideration new developments in the art of radio broadcasting. This lease runs for a period of time. In that period of time, television may come into the picture, and also frequency modulation. Those two developments may require additional expenditures on the part of the new owners if they keep abreast of the new operations.

3441 Q. Did you know that Mr. Bradshaw had originally asked for a cash payment of $150,000 for a lease and the lessee to also have at least $150,000 capital before the lease was executed?

A. I am not familiar with the development of the leasing arrangement at all. I dropped the matter after we had [fol. 763] decided that we could not afford to assist, we didn't think it advisable to assist the new purchasers in the outright purchase of the station as contrasted with the leasing arrangement. I am not familiar with those arrangements at all.

3442 Q. Would you consider such a requirement as reasonable?

A. I haven't given the matter any thought.

3443 Q. If the lessee of the station was not required to pay any income tax, then the rental should obviously be higher, shouldn't it?

A. That is, of course, a moot question. Under this rental arrangement, the Woodmen of the World are going to get $855,000 for their property. With the probable changes in the art of broadcasting and the other hazards in connection with the business, I think that is a very fair price for the station.

I would just enumerate that we purchased two very good stations for $950,000—one of them in Denver, one in San Francisco. Both of them have substantial markets. Both of them have substantial transmitters—one of fifty kilowatts and the other of seven and a half kilowatts which can be put up to fifty kilowatts. And when we purchased those for $950,000—by contract, I think $855,000 is a very fair price for WOW.

3444 Q. What were those two stations earning at the time you purchased them?

A. I don't recall.

3445 Q. Can you state approximately?

A. I would say—I can't give you that—I don't recall the figures. I can of course get those and give you—supplement those figures for you.

We purchased certain other stations—I don't recall just what we paid for WTAM in Cleveland. I think some $600,000.

[fol. 764] 3446 Q. Do you recall what it was earning at that time?

A. It was back in the days when radio stations weren't making very much money. I think we purchased it in 1931 or 1932, and I imagine the station was probably in the red at that time.

3447 Q. Will you furnish the figures of the earnings of the Denver and the San Francisco stations at the time you purchased them?

A. If I can get that. At the time the General Electric owned the stations and we were leasing them from them, and we were paying the General Electric a substantial lease rental at that time.

3448 Q. What lease rental were you paying at that time?

A. I don't recall the figure now.

3449 Q. Those figures would all be available somewhere in the organization?

A. That's right.

3450 Q. Has your company acquired any stations recently?

A. The two that I just referred to.

3451 Q. Other than those two?

A. No, sir.

3452 Q. Who acquired KNX of Hollywood?

A. Columbia Broadcasting.

3453 Q. And who acquired WMAC?

The Witness: WMCA, you are thinking of.

Mr. Stewart: Correct that, please.

A. That was purchased by Mr. Ed Noble.

3454 Q. Your company wasn't connected with either of those transactions?

A. No.

3455 Q. Well then, Mr. Trammell, as I understand your testimony, your opinion that this lease rental is fair is based on the assumption that the present value of that lease rental over the period of the lease is somewheres from $850,000 to $900,000?

[fol. 765] A. I think it is excessive.

3456 Q. You think it is at least a fair price for it?

A. I think it is more than that, yes.

3457 Q. But your opinion is based on the fact that it, in effect, amounts to a sale of the station—this long-time lease?

A. I can't say that it is a sale because I think under the contract it goes back to the owners, as I recall.

3458 Q. If your company owned WOW, would you favor its leasing the station on the basis of this lease in question?

A. Well, our company is in the Broadcasting business, and we hang on to everything that we own. We don't sell stations, and we prefer to manage them ourselves, and that is our business. If our company owned this station, we would continue to own it and operate it, just like we own WMAQ in Chicago, WTAM in Cleveland, WRC in Washington. We have no desire to sell any of the properities that we own.

3459 Q. Well, assume that you were the owner of Station WOW and that you had more than $100,000,000 of assets—no reason to dispose of the station from a financial standpoint, and that the station was making—had made in the year 1942 approximately $278,000, would you think it a desirable deal for you to lease that station upon the

basis of the lease that you have been questioned about today?

A. That would have to depend altogether upon other considerations in connection with the business that I was primarily engaged in. If I were in the insurance business, I would give one answer; if I were in the broadcasting business and an operator of a number of stations, I would give an entirely different answer.

3460 Q. Well, as an insurance company, what would your answer be?

A. I can't answer for the insurance company because I don't know all of the considerations that prompted them to make this decision.

[fol. 766] 3461 Q. Well now, you said you couldn't answer it from the standpoint of an insurance company but could from the standpoint of a broadcasting company. What would your answer be?

A. From the standpoint of a broadcasting company, I would keep the station. I wouldn't be interested in disposing of it for any consideration because that is not our policy and our practice. When we own a station, we keep it.

3462 Q. Well, from the standpoint of the broadcaster, what do you consider a fair value of this station?

A. Under its present earning capacity under the tax law and with the lack of a tax base, it would be very difficult for me to estimate it, but say that it earns $50,000 a year after taxes, I would assume that five times its earnings or at a maximum—and I would hesitate on that—at ten times its earnings, would be a very fair price.

3463 Q. Somewheres between——

A. (Interposing.) $250,000 and $500,000.

3464 Q. (Continuing) Somewheres between five times and ten times its earnings after taxes would be a fair price?

A. That's right.

3465 Q. What do you consider the value of the station's network contract with your company?

A. Well, I consider an affiliation with the National Broadcasting Company is a very valuable arrangement so far as the station is concerned—and I think that you will find that the majority of the stations on our network feel the same way. I couldn't place any dollar value on it, but it is a very valuable franchise in our opinion.

3466 Q. What does your company pay WOW for time on the station?

A. My recollection—and I will have to give you these figures later—my recollection is that it will run somewhere around one hundred fifty—$200,000 a year; maybe more than that.

[fol. 767] Our contractual arrangement with WOW is on a sliding scale basis. The first sixteen commercial unit hours—unit hours, mind you—that send to their station we take as a connection charge. The next twenty—the first twenty-five hours after that, we pay the station twenty per cent of its unit hour rate. The next twenty-five unit hours, we pay them on the basis of thirty per cent, and all over sixty-seven unit hours, we pay them on a basis of thirty-seven and a half per cent.

3467 Q. How does the earnings of Station WOW compare with other stations affiliated with your network that are similar in character?

A. I am in no position to give you the earnings of the station because I don't have those figures. I could give you the payments that we make to the stations for the carrying of network programs, and I would say that they are just about the same as other stations within the same rate bracket and the same general market area.

3468 Q. Are there many stations in the country that made a net of $278,000 last year?

A. I can't answer that, because we have no figures on what the stations make net.

3469 Q. Well, you have on your own stations that you operate?

A. Yes—ours are fifty kilowatt stations, with the exception of WRC in Washington—and our bookkeeping arrangements and our set-up are such that I don't think it would give you a comparative figure.

3470 Q. Do you know of any changes that are contemplated in the operation of this station by the lessees?

A. No, none whatsoever. I think the management has been unusually capable, and with Mr. Gillin continuing as [fol. 768] Manager I see no reason why it shouldn't continue to be one of the better operated stations in the country.

Mr. Gillin has a very high regard for the public service responsibility of a radio station, and I am certain that the

station under his continued management will serve, and serve well, the public of Omaha and the vicinity.

3471 Q. And it will be a good money-maker too, won't it probably, under his management?

A. It all depends on the tax situation.

3472 Q. Well, so far as the management is concerned, Mr. Gillin has been a good manager from an earning standpoint as well as the other standpoints?

A. That is right.

The continued earnings of the station will depend on two things: what is going to happen to advertising under the present unpleasantness; also your tax situation.

3473 Q. I am not sure whether I asked you when the blue Network acquired WENR in Chicago?

A. That was around 1931 or 1932, as I recall.

3474 Q. Do you recall what they paid for it?

A. Yes, we paid a million dollars for it.

3475 Q. Was it earning anything at the time you acquired it?

A. I don't think it was. Not in those days, it wouldn't be.

3476 Q. And when did you acquire WJZ?

A. WJZ was originally owned by the Radio Corporation at the time. Then when N. B. C. was formed, that was transferred as one of the assets of the Radio Corporation —one of the assets of the National Broadcasting Company. It was one of the original stations in the formation of the company.

3477 Q. Was a value placed on it when it was transferred?

A. That I can't answer. I imagine it was; I don't know.

Thereupon counsel for defendants read as follows:

[fol. 769] Redirect examination.

By Mr. Wells:

3478 Q. When N. B. C. originally purchased many years ago WENR in Chicago, what elements entered into that purchase?

A. One of the reasons why we have purchased most of the stations, especially in the early days, was because of our inability to get clearance for our regular commercial programs in that particular area, and we were forced to

go into these markets and buy these stations, particularly WENR in Chicago and WTAM in Cleveland in order to get a clearance for our regular commercial programs.

In those days, very few stations were earning any money, but we felt that it was so vital to our network operations that we have clearance in such a major market as Chicago, that we went in there and purchased these stations—WENR in Chicago, and WTAM in Cleveland—and then, of course, we anticipated in the future that broadcasting would be a profitable enterprise.

3479 Q. Another way of stating it as I understand you was that you couldn't get any business for your network unless you had some stations that gave you an outlet?

A. That's right.

3480 Q. Mr. Trammell, will you venture to give in effect your opinion as to the effect of the Federal Communications Commission regulations which are now in litigation in an action pending in the United States Supreme Court on WOW if those are sustained?

A. Well, it has been my feeling right from the inception of the issuance of these regulations that if they were made effective as promulgated, that they would place a tremendous hazard in the network operation and whatever success the present system of network operation has contributed to the success of WOW, it would to that extent place the operation of WOW in jeopardy.

[fol. 770] 3481 Q. Do you know Mr. J. E. Davidson, the General Manager—the President of the Nebraska Power Company of Omaha?

A. I do. He is a very good friend of mine.

3482 Q. How long did you say you had known Mr. Bradshaw in a business way?

A. As I recall, Judge, it is seven, eight years.

3483 Q. Do you think you know Mr. Bradshaw's general reputation in the business world for honesty, integrity, good business judgment?

A. I would say that——

3484 Q. (interposing) Answer the question—do you know? Yes or no?

A. Yes.

3485 Q. Would you please state what that reputation is?"

Mr. Stewart: To which the plaintiff objects as incompetent, irrelevant and immaterial, no proper or sufficient foundation laid and not redirect examination.

The Court: I think you may answer.

"A. It is excellent. His integrity, honesty and sound judgment is beyond question. It is splendid.

Mr. Wells: That is all."

Thereupon counsel for plaintiff read the recross examination, as follows:

[fol. 771] "Recross-examination.

By Mr. Stewart:

3486 Q. Mr. Trammell, did you know the purchase price of any of these stations that you acquired—that your company acquired—WEAF?

A. WEAF We paid—in 1926, we paid the telephone company a million dollars for it.

3487 Q. Was it earning anything at that time?

A. That I can't say; I don't know.

3488 Q. What did you pay for WRC?

A. I think we built—the Radio Corporation built WRC, and it was transferred to the National Broadcasting Company as one of its assets when it was established.

3489 Q. What did you pay for WTAM?

A. I recall it was around $600,000.

3490 Q. When was that purchased?

[fol. 772] A. 1931, 1932—maybe 1930.

3491 Q. Was it earning anything at that time?

A. I can't answer that, but my answer was that it wasn't.

3492 Q. And what did you pay for WMAQ in Chicago?

A. $1,250,000.

3493 Q. Was it earning anything when you acquired it?

A. That I do not recollect, but we acquired those stations for the same reason that I have enumerated above—first, our confidence in the future of broadcasting and, second, that it was essential that we get an outlet or satisfactory outlets in these major markets.

3494 Q. When did you acquire WMAQ, about?

A. I think it was 1931 or 1932, about the same time that we acquired WENR.

3495 Q. When did you acquire KOA at Denver?

A. We leased that originally from the General Electric Company in 1932, and we purchased it in December, 1941.

3496 Q. When did you lease KOA originally?

A. As I recall it, it was in 1932.

3497 Q. Do you recall the rental?

A. I do not. We leased three stations from the General Electric at the same time—WGY, Schenectady; KGO, San Francisco; and KOA, Denver. I don't recall whether the individual lease prices were broken down or not.

3498 Q. Do you recall the lease price for the total?

A. No, I do not.

3499 Q. Did you acquire all of those by purchase?

A. KGO, San Francisco for around $900,000; General Electric still owns WGY, Schenectady, and we own KOA, Denver. WGY—we have a leasing arrangement with them on that station.

3500 Q. Did I understand you to say that at the time you acquired those two stations from General Electric by purchase that they weren't earning anything at that time?

A. No, I said I didn't recall that they were earning.

3501 Q. Will you please supply the information that I [fol. 773] requested for the record?

A. Yes, I will.

Mr. Stewart: I believe that is all Mr. Trammell."

(Witness Excused).

[fol. 774] 3502 Mr. Massey: On behalf of the defendants, Radio Station WOW Inc., and John Gillin, Jr., I desire to join in the offer of all of the deposition of Mr. Erickson, both direct and cross, redirect and recross, and likewise I want to join in the offer of all of the deposition of Niles Trammell, both the direct, cross, redirect and recross.

The Court: So far as I am concerned, that is already in.

Mr. Massey: That has been offered.

Mr. Stewart: Well, we just finished reading the Trammell deposition.

Mr. Massey: The offer was limited.

3503 Mr. Crossman: I offered it on the part of certain defendants, that is, the Woodmen Society and the seven officers and directors, and I take it Mr. Massey joins in that offer on behalf of the two defendants whom he represents.

Mr. Massey: That is correct.

Thereupon an adjournment was taken until 9:30 A.M. Monday morning, March 8, 1943.

9:30 a.m. Monday, March 8, 1943.

Court convened pursuant to adjournment, same parties present as before, and the following proceedings were had:

[fol. 775] WILLIAM D. LANE, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

3504 Q. Please state your name, residence and occupation?

A. William D. Lane, 656 North 57th Street, Omaha; I am in the box manufacturing business.

3505 Q. With whom, Mr. Lane?

A. Eggerss-O'Flyng Company.

3506 Q. What is your official position with that company?

A. President.

3507 Q. How long have you been in business in Omaha?

A. I have been forty-three years with Eggerss-O'Flyng Company, and worked two years before that in a grocery store.

3508 Q. In the grocery business?

A. Yes.

3509 Q. Have you had any connection with any business organization in this city that would bring you in contact with the general business of the city?

A. Yes; I have.

3510 Q. What is that?

A. I am Past President of the Omaha Manufacturers Association, and I am a Past President of the Omaha Chamber of Commerce.

3511 Q. In those capacities have you had an opportunity of becoming familiar generally with the business of the city of Omaha?

A. I have.

[fol. 776] 3512 Q. Are you a member and carry a benefit certificate in the Woodmen of the World Life Insurance Society?

A. I do.

3513 Q. How much insurance do you carry, Mr. Lane?

A. $2000,00.

3514 Q. I presume that you have known of the Woodmen of the World Life Insurance Society owning and operating Radio Station WOW?

A. Yes; I do.

3515 Q. You have been advised that that Society has leased that station to a new corporation known as Radio Station WOW?

A. Yes, I do.

3516 Q. On the basis of the proven facts in this action that Radio Station WOW, Omaha, operates under a construction permit and federal license from the Federal Communications Commission on a frequency of 590 kilocycles with a power of 5000 watts day and night, and is a full time station with a coverage of approximately a million radio families; that the original cost of its present equipment was $175,000 which has been written off wholly or amortized by the owner; that there was no net operating income from 1923, the date of its installation, to 1935, inclusive; that the net operating income for 1936 was $137,904.00. 1937 $204,631.00, 1938 $174,169.00, 1939 $170,653.00, 1940 $181,032.00, 1941 $212,807.00, 1942 $287,437.00, in the last two years of which no fees were paid to ASCAP for music which had previously been paid annually in the sum of more than $20,000.00; that a fifteen year lease contract [fol. 777] has been entered into between the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc., at a monthly rental of $8,166.00 for the first three years, $5680.00 for the next twelve years of the term of the lease, with an additional monthly rental income of $2,117.00 for space in its Insurance Building for the entire term of the lease; that the present worth of the monthly rental income for the radio facilities on a four percent interest basis is $855,972.82, and on a three percent interest basis is $910,351.55; that the total lease and rental income for the radio facilities and space for the fifteen year term lease is $1,492,956.00; plus the interest on this monthly income; that the lease agreement requires the lessee to maintain said Radio Station in first class condition and to purchase and install at its own expense all necessary new and additional equipment, machinery and devices to enable it

to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, to pay all city, county, state and federal taxes levied or imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; that at the end of the fifteen year lease lessee shall deliver and surrender possession of all the equipment then in use, and join in an application to the Federal Communications Commission for the transfer of the license back to the Woodmen of the World Life Insurance Society; that the Secretary of the Treasury of the [fol. 778] United States in March 1932 recommended a revision of the Federal revenue laws so as to impose an income tax on the income from unrelated activities other than the insurance business, of the Woodmen of the World Life Insurance Society, and that legislation has been proposed in Nebraska imposing a tax not only on the income from Station WOW, but also on the gross contributions or premiums received by the Society from its members; that a Bill was introduced in the Nebraska Legislature prohibiting this Society from owning, maintaining and operating Radio Station WOW; that by reason of making said lease the officers of the Society would be relieved from the duties and responsibilities of administering the activities of said Radio Station WOW and thereby be enabled to devote their entire time to the business of insurance—on the basis of these facts, is it your opinion that the Board of Directors of the Woodmen of the World Life Insurance Society exercised sound business judgment in making this lease contract, and that the lease rental provided in said lease agreement is a fair and adequate consideration for this Station? On the basis of that have you an opinion as to whether or not that was an exercise of sound business judgment? Have you such an opinion?

3517 Mr. Stewart: Just answer yes or no whether you have an opinion, please.

A. Yes.

[fol. 779] 3518 Q. What is that opinion?

Mr. Stewart: Plaintiff objects as incompetent, irrelevant and immaterial, no proper or sufficient foundation laid, calling for a conclusion of the witness and invading the province of the Court, and involving a decision of the question of law that is involved in this action.

The Court: You may answer.

A. I think they made a very good deal.

3519 Q. What do you base your judgment on, Mr. Lane?

A. In going over the figures and seeing what they are receiving in dollars and cents plus the fact that at the end of the fifteen year period they get the station back, and it calls for the return to them of the property in as good or better order, I think they have made a very good deal for the Society.

3520 Q. What is your opinion as a member of the Society and interested in this action?

Mr. Stewart: Plaintiff objects as incompetent, irrelevent and immaterial, no proper or sufficient foundation laid, calling for a conclusion of the witness, and invading the province of the court, and involving a decision of the question of law that is involved in this action.

The Court: You may answer.

A. I think that they have taken care of their policyholders in getting this yield.

3521 Q. Based upon your acquaintance with the territory served by this radio station what is your opinion as [fol. 780] to whether this station has contributed to good will and influence for the benefit of this Society in this territory?

A. I am fairly well acquainted with the radio business, but I am a listener and this station has built up a fine prestige in this area and is recognized as the leading station in this area, but as to its immediate value for advertising purposes for the Woodmen of the World, my personal opinion would be that it has very little value at the moment, while it had many years ago a great value.

Mr. Wells: You may take the witness, Mr. Stewart.

Cross-examination.

By Mr. Stewart:

3522 Q. I believe you said you had never been in the radio business?

A. No.

3523 Q. How long have you been a member of the Society, Mr. Lane, approximately?

A. Seven or eight years.

3524 Q. Are you acquainted with any of the officials of the Society?

A. Yes; I know them.

3525 Q. What has been the nature of your acquaintance with those officials?

A. Well, I have known practically all of those men through Chamber of Commerce work, and through other kinds of civic work in Omaha.

[fol. 781] 3526 Q. How long have you known Mr. Bradshaw at present?

A. Well, somewhere between twelve to fifteen years; I couldn't answer the exact time.

3527 Q. Have you had any business transactions with Mr. Bradshaw and the Society?

A. No,

3528 Q. Has your acquaintance with Mr. Bradshaw been of a social nature?

A. Yes, social and civic.

3529 Q. And is that true of the other officials of the Society with whom you are acquainted?

A. That is right.

3530 Q. Has your company had any business transactions with the Society?

A. Yes, in a small way.

3531 Q. What has been the nature of that, Mr. Lane?

A. The containers which we make, they have had some use for them in a small amount, very limited amount.

3532 Q. Are you acquainted with John Gillin?

A. Yes.

3533 Q. What has been the nature of that acquaintance?

A. Well, civic and personal over a number of years.

3534 Q. Have you had any business transaction with Gillin?

A. No, I haven't.

[fol. 782] 3535 Q. Has your acquaintance with Gillin been such that you would consider him a close friend?

A. No; I don't think so.

3536 Q. You have never been in the insurance business?

A. No, I haven't. I will qualify a little further, however, to say that I was on the Policy Holder Examining Committee for the Northwestern Mutual Life Insurance Company of Milwaukee for two years, and one year as chairman of the Auditing Committee for Policyholders.

3537 Q. That was not a fraternal company?

A. No.

3538 Q. What figures did you have in mind as being the net income for the Society from the Radio station last year?

A. I can't testify from memory on that; I had the general statement.

3539 Q. Do you have any knowledge of the value of the radio station?

A. Only what I have read; I have no personal knowledge.

3540 Q. Or any knowledge of the rental value of the station.

A. No, I don't have.

3541 Q. I guess I asked you, you have never been in the radio business?

A. I have not.

Mr. Stewart: I believe that is all.

Redirect examination.

By Mr. Wells:

3542 Q. Did I understand you to say you were on a committee as Chairman of the Committee for the Northwestern [fol. 783] Mutual Life Insurance Company to audit its investments?

A. That is right.

3543 Q. In making the audit for those years did you make any study of the investments of the Woodmen of the World to ascertain the value of the Northwestern Mutual Life Insurance Company investments?

A. It was one of the companies we did consider.

3544 Q. How did you find those investments?

A. Excellent.

Recross examination.

By Mr. Stewart:

3545 Q. Mr. Lane, do I understand that you believe that the directors exercised sound business judgment in disposing of this station because you don't consider it a proper investment for the Society?

A. I didn't say that. My thought is entirely along the line that here is a property that is confronted with severe taxa-

tion and which we are, all in business, acquainted with today; if we are not, we better get ready, and I simply took the amount of money as rental under the lease plus the fact that they were establishing themselves with a long term good tenant paying a very healthy, I thought, rental, that the holding itself at the end of the period would be a considerable amount of money, and I think comparable with the normal investments that it was an extremely high yield.

[fol. 784] 3546 Q. That is, you think the Society from an investment standpoint is better off to have this rental under the terms of the lease than to get the income that it has been receiving from the station from its own operation?

A. That would be my judgment, yes.

3547 Q. Do you have in mind about how much the income of the Society will be reduced by reason of this transaction?

A. No, I don't think—I don't think mathematically you can figure it; you don't know what your taxes will be but you know you are going to have them.

3548 Q. Well, fraternals have always been exempt from taxation, haven't they, Mr. Lane?

A. Yes.

Mr. Stewart: That is all.

(Witness excused.)

[fol. 785] Leo B. Bozell called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

3549 Q. Please state your name, residence and occupation?

A. Leo B. Bozell; I live on the 96th Street road about a quarter mile south of Dodge; I am in the advertising business, the head of Bozell and Jacobs Advertising Company.

3550 Q. How long have you been in that business in Omaha?

A. As a business, a definite organization, since 1926. I mean that was the time we incorporated; prior to that time I was doing publicity and advertising, but simply as a couple of individuals.

3551 Q. How long have you resided in Omaha and been connected with the city in a civic way?

A. Since 1912.

3552 Q. What businesses in Omaha have you represented or do represent during this period of time?

A. I didn't understand the question.,

3553 Q. What business interests of Omaha had you represented and what with, in Omaha, in the advertising business?

A. Oh, the street railway company, Metropolitan Utilities District, Northwest Bell Telephone Company, Nebraska Power Company, Roberts Dairy, Metz Brewing Company, the Joint Market Committee of the Union Stockyards Company and the Livestock Exchange, Paxton Mitchell Company, J. L. Brandeis, Nebraska Clothing Company; there [fol. 786] are some others; I don't recall them now.

3554 Q. With what organizations have you been connected and in what capacity in the city in a business way?

A. Well, at the moment I am Vice-President and Chairman of the Executive Committee of the Omaha Chamber of Commerce.

3555 Q. You have been connected with the Omaha Chamber of Commerce for a number of years?

A. Yes sir.

3556 Q. And active?

A. That is active on committees and things of that kind.

3557 Q. Have you worked with civic organizations throughout the years?

A. Yes.

3558 Q. Are you a member of the Woodmen of the World Life Insurance Society?

A. Yes sir.

3559 Q. How much insurance do you carry in that organization?

A. I think it is $2,000 or $2,500; I don't remember, Mr. Wells.

3560 Q. How long have you been a member?

A. I would say ten or twelve years.

3561 Q. I presume you have been advised that the Woodmen of the World Life Insurance Society has owned and operated the WOW Radio Station?

A. Yes.

3562 Q. You have also been advised that a lease of that property has been made to Radio Station WOW Inc?

A. Yes.

[fol. 787] 3563 Q. On the basis of the proven facts in this action that Radio Station WOW, Omaha, operates under a construction permit and federal license from the Federal Communications Commission on a frequency of 590 kilocycles with a power of 5000 watts day and night, and is a full time station with a coverage of approximately a million radio families; that the original cost of its present equipment was $175,000 which has been written off wholly or amortized by the owner; that there was no net operating income from 1923, the date of its installation, to 1935, inclusive; that the net operating income for 1936 was $137,904.00, 1937 $204,631.00, 1938 $174,169.00, 1939 $170,653.00, 1940 $181,032.00, 1941 $212,807.00, 1942 $287,437.00, in the last two years of which no fees were paid to ASCAP for music which had previously been paid annually in the sum of more than $20,000.00; that a fifteen year lease contract has been entered into between the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc. at a monthly rental of $8,166.00 for the first three years, $5,680 for the next twelve years of the term of the lease, with an additional monthly rental income of $2,117.00 for space in its Insurance Building for the entire term of the lease; that the present worth of the monthly rental income for the radio facilities on a four per cent interest basis is $855,972.82, and on a three per cent interest basis is $910,351.55; that the total lease and rental income for the radio facilities and space for the fifteen year term lease is $1,492,956.00, [fol. 788] plus the interest on this monthly income; that the lease agreement requires the lessee to maintain said Radio Station in first class condition and to purchase and install at its own expense all necessary new and additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, to pay all city, county, state and federal taxes levied or imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; that at the end of the fifteen year lease lessee shall deliver and surrender possession of all the equipment then in use, and join in an application to the Federal Communications Commission for the transfer of the license back to the Woodmen of the World Life Insurance Society; that the

Secretary of the Treasury of the United States in March 1932 recommended a revision of the Federal revenue laws so as to impose an income tax on the income from unrelated activities other than the insurance business, of the Woodmen of the World Life Insurance Society, and that legislation has been proposed in Nebraska imposing a tax not only on the income from Station WOW, but also on the gross contributions or premiums received by the Society from its members; that a Bill was introduced in the Nebraska Legislature prohibiting this Society from owning, maintaining and operating Radio Station WOW; that by reason of making said lease the officers of the Society would [fol. 789] be relieved from the duties and responsibilities of administering the activities of said Radio Station WOW and thereby be enabled to devote their entire time to the business of insurance—on the basis of these facts, is it your opinion that the Board of Directors of the Woodmen of the World Life Insurance Society exercised sound business judgment in making this lease contract, and that the lease rental provided in said lease agreement is a fair and adequate consideration for this Station? Have you an opinion?

A. Yes.

3564 Q. Have you an opinion as a business man of this city and also a member of this Society?

A. Yes.

3565 Q. What is that opinion?

Mr. Stewart: Objected to as incompetent, irrelevent and immaterial, no sufficient foundation laid, calling for a conclusion of the witness and invading the province of the Court, and calling for an opinion on an issue of law involved in this case.

The Court: He may answer.

A. My opinion is that it was an excellent business deal for the Society who desired protection for the members.

3566 Q. Upon what do you base those judgments as a business man and as a member of the Society?

A. The amount of money that the Society will receive in [fol. 790] rental from the station, that is, I base it upon the amount received in rental from the station and the amount of rent it receives from the station as a tenant compared to what would in all likelihood be a much lesser amount when taxes are paid as they will be when levied. That is what

I think of it as a business deal. I think the Society is getting more money out of it than it would from the station over a period of years, and I think there might be some charge—I am now speaking as a protection to the members, if the income tax was levied on the income of the station, as it undoubtedly will be, they might apply that to the entire income of the Society, which might raise my premium and the premium of everybody else.

3567 Q. What do you think the value of that radio station is to the Society in the way of advertising its business and causing it to receive an increased production of business and new members in this territory?

A. Well, I don't think it had any particular value the way it has been operated.

3568 Q. Why?

A. Well, it was a radio station and under the rules it couldn't very well boost its owner unless it charged the advertising rates for it. It was known as Radio Station WOW, wasn't known as a life insurance society; it was just like another radio station.

3569 Q. You think the insurance society had been lost [fol. 791] in the shuffle and had turned their attention to the radio station?

A. Entirely.

Mr. Wells: You may ask him.

Cross-examination.

By Mr. Stewart:

3570 Q. Have you always felt that way about it, Mr. Rozell?

3571 Q. As I understand it you think from an income standpoint the Society is better off to receive this lease rental that it gets under the terms of the lease than to receive the income such as it received last year from its own operation of the station?

A. Well, on the lease rental it is on a guaranteed basis and the other is so uncertain; I think everybody in business thinks that income it has been receiving will not continue, will probably go down a hundred thousand dollars. I would rather have something that is guaranteed than something that probably won't stay.

3572 Q. You don't agree with Mr. Gillin then, the manager of the station, that the income of the station will continue to increase?

A. I don't know Mr. Gillin's opinion, but I believe the income from the station will be taxed regardless of who owned it or operated it, and if it is taxed that income re-
[fol. 792] ceived will no longer be there.

3573 Q. It will shrink to a few thousand dollars?

A. That is right.

3574 Q. A year, you mean?

A. Yes.

3575 Q. Well, what guarantee is there than that the Society will receive this rent over the term of the lease?

A. Well, I suppose there is no guarantee.

3576 Q. Well, I thought that was what you said: it would be better to have a guaranteed income—what did you have in mind?

A. Well, I had in mind if the business of the radio station is taxed it would not be making $200,000.00 a year; it would be limited, much less than that. I think the station will get the dollars, at least it will get a lot of dollars, at least enough to pay its expenses; the expenses will not be taxed. I don't think the present owners of the lease will have much left when they get through paying the rent on their quarters and the rent on other property.

3577 Q. Do you know how much capital was invested in the new company that leased the station?

A. No, I don't.

3578 Q. So you wouldn't know how much is back of the new company, of a guarantee, as you say, the rental that is to be paid over the terms of the lease?

A. Well, I know it has a record of earnings that is back of it.

[fol. 793] 3579 Q. That is the station?

A. The station. The station has a record of earnings. I don't know how much capital is in it.

3580 Q. Have you ever been in the radio business?

A. No not directly, at all. I have bought lots of time on the radio stations.

3581 Q. Have you ever represented the Society? Has it ever been a client of yours or customer of yours?

A. Yes; it is now in a small way. The radio was at one time; they quit us.

3582 Q. How long has the Society been a customer of your company?

A. Oh, I suppose ten or twelve years.

3583 Q. Now, you are acquainted with the officials of the Society?

A. Some of them. Most of them, I believe.

3584 Q. You know Mr. Bradshaw, I presume?

A. Yes.

3585 Q. What has been the nature of that acquaintance?

A. Oh, it has been in a business and social way. I met him largely in civic activities and sometimes social.

3586 Q. Do you know John Gillin?

A. Yes, very well.

3587 Q. What has been the nature of that acquaintance?

A. Business and civic.

3588 Q. Social also?

A. Somewhat, yes sir.

[fol. 794] 3589 Q. Now, I assume that you don't claim to know the value of this station, the sale value of the station, the radio station?

A. You mean the sale value of its equipment?

3590 Q. Yes.

A. No, I don't.

3591 Q. Of everything that the station owns—do you know anything about the value of the station in that respect?

A. Not specifically. It has been my business; we have watched the values of radio stations and other advertising media.

3592 Q. Do you know, Mr. Bozell, whether fraternal insurance companies are exempt from income tax?

A. I understand their premium income and that sort of thing is exempt.

3593 Q. Well, what part of their income do you understand is subject to Federal income tax?

A. Well, I understand—I don't know that any of it is now—I know there has been a good deal of discussion in the last few years about taxing income that comes from sources other than the insurance business.

3594 Q. Do you know whether the premium income or any other income of the Society is subject to state taxes in Nebraska?

A. I don't know the answer to that, no sir.

3595 Q. Well, do I understand the reason why you believe the lease is desirious is because of this threat of taxation?

A. Yes; that is the principal reason. There is another reason why I think it is.

3596 Q. What is the other reason?

A. The other reason is, for the next few years the adver-
[fol. 795] tising business is on a fairly uncertain basis; there are no long contracts during the war; nobody knows what is going to be the nature of it a year from now, and I have a feeling that the stockholders of the radio station, when they get through paying their expenses, they are not going to have anything left.

3597 Q. You don't think it is a good deal then for the new company?

A. Well, I would not put any money in it.

Mr. Stewart: That is all.

Redirect examination.

By Mr. Wells:

3598 Q. I believe you say you represented the Nebraska Power Company as advertising agent for sometime?

A. Yes sir.

3599 Q. Is that power company advertising over the station before the lease and since the lease on a consideration basis?

A. Well, I know it did before, and I think we have a contract with them right now. I can find out by phoning the office. I am sure we do.

3600 Q. Is the Nebraska Power Company interested one way or another in this lease?

A. I do not know of it if they are.

3601 Q. You never heard about the Consumers Public Power Company having anything to do with it, did you?

A. No sir.

Recross examination.

By Mr. Stewart:

3602 Q. You don't have anything to do with the Con-
sumers?

[fol. 796] A. No.

3603 Q. Have you ever done any advertising for them?

A. No.

3604 Q. So you would not probably know one way or the other whether the Consumers was interested:

A. Well—(interrupted).

Mr. Stewart: Never mind that. That is all.

(Witness excused.)

3605 Mr. Crossman: At this time we will read the Long deposition. Mr. Massey, do you join with us in the offer of this deposition of Mr. Long?

3606 Mr. Massey: Yes, all the deposition, direct, cross-examination, redirect and recross on behalf of Radio Station WOW Inc., and John Gillin.

3607 Mr. Crossman: All defendants join in the deposition of Zeb V. Long, Jr., taken at Washington, D. C., on January 18, 1943.

Thereupon Mr. Crossman read from the deposition as follows:

"Deposition of Zeb V. Long, Jr.

Zeb V. Long, Jr., of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Wells:

3608 Q. Please state your name, residence and occupation or profession.

A. Zeb V. Long, Jr., Washington, D. C., Clerk of the [fol. 797] Ways and Means Committee, House of Representatives.

3609 Q. As Clerk of the Ways and Means Committee of the House of Representatives, do you have in your possession and charge the Public Hearings before the Committee on Ways and Means of the House of Representatives of the 77th Congress, Second Session, on the Revenue Revision of 1942?

A. I do.

3610 Q. I hand you Volume 1 of those Hearings as published and direct your attention to page 89, will you please state if that paragraph #7 entitled "Additional Examples

of Special Privileges" reports the recommendation of the Treasury Department in the statement of Mr. Randolph Paul, tax advisor of the Secretary of the Treasury?

A. Page 89 of Volume 1 handed to me is a part of the statement of Randolph Paul, tax advisor to the Secretary of the Treasury.

3611 Q. Will you please examine the same volume, on page 80, the statement of Mr. Paul in his statement at the bottom of page 80 and the top of page 81, and read the statement of Mr. Paul as to the purpose of his appearance?

A. I am reading from page 80 of Volume 1, Public Hearings before the Ways and Means Committee:

> "Mr. Paul. My purpose in appearing before you at this time is to discuss in greater detail some of the matters mentioned by the Secretary in his statement, and also to present some additional matters of a more technical nature. While it is not possible to mention all the technical suggestions we would like to present to this committee, I believe that a description of the more important matters will help to acquaint taxpayers with our views. I will follow as far as possible the order of treatment contained in the Secretary's statement."

3612 Q. Mr. Paul in that statement refers to the 'Secretary,' will you please examine page 80 above that statement and previous pages and state what 'Secretary' to whom he was referring?

A. From examination of page 80 in the volume before me, it appears that Mr. Paul was referring to the Secretary of the Treasury, Secretary Morgenthau.

[fol. 798] 3613 Q. Will you please cut out the leaf wherein there appears pages 89 and 90 and the paragraph 7 above referred to and file it with the Notary and make it a part of your deposition?

A. I will, and hereby hand the leaf to the stenographer and make it a part of my deposition.

3614 Q. I now hand you a document, No. 6, entitled "Miscellaneous Data on the Proposed Revenue Bill of 1942, submitted to the Committee on Ways and Means, House of Representatives, June 4, 1942," and ask you to examine paragraph 7 at page 71 and state if that indicates the action of the Committee on that item after the public hearing.

A. The document I hold in my hand is a true copy of the document mentioned and described in the preceding question.

3615 Q. Will you cut out the leaf, pages 71 and 72, and file it with the stenographer and make it a part of your deposition?

A. I will.

3616 Q. Are these documents to which we have been referring public documents printed and distributed by the United States Government?

A. They are."

3617 Mr. Crossman: I will read now from page 89, which is attached to Mr. Long's deposition:

"7. Additional Examples of Special Privileges. A. Income taxes—(a) Tax-exempt corporations engaged in business. Our revenue laws have been generous in exempting certain corporations from the income tax. Thus charitable or educational corporations are not subject to the corporate income tax. Many exempt corporations, however, [fol.799] have so far departed from the purpose of the exemption as to engage in trades and business completely unrelated to their exempt activities, and yet the income of such business activities remains exempt from tax. If a college operates a hotel, the earnings of the hotel are exempt; if an orphans' home operates a waterworks and an electric power and gas company, the earnings of these utilities are exempt; if a charitable organization operates a bathing beach, the earnings of the beach are exempt. In this way sources of considerable tax revenue are withdrawn from the scope of the tax. At the same time privately owned businesses are forced to compete with other businesses not subject to an income tax.

It is believed that the exemptions accorded to such organizations should not be so distorted. It is therefore suggested that such corporations be taxed on the income derived from a trade or business not necessarily incident to their exempt activities. Thus, it is not intended to tax an institute for the welfare of the blind on the proceeds from the sale of articles made by those aided by the institute. It might also be desirable to allow a flat exemption of $5,000 regardless of the nature of the business activity."

3618 Mr. Crossman? I now read from page 71·

"7. Charitable Organizations Engaged in Trade or Business. Committee Action: Deferred Until Later Legislation.

Colleges, charitable organizations, and religious institutions, under the present law, may engage in business in direct competition with fully taxable persons and receive the income therefrom wholly tax-free.

This amendment was designed to subject to the corpora- [fol. 800] tion normal tax and surtax the net income of such institutions in excess of $5,000 in cases where the institution had departed from its exempt activities to the following extent:

(1) It must engage in a trade or business;

(2) It must regularly carry on such trade or business;

(3) It must derive net income in excess of $5,000 from such business activities;

(4) Such business activities must not be necessarily incident to its exempt activities."

Thereupon counsel for plaintiff read from the deposition as follows:

"Cross-examination.

By Mr. Stuart:

3619 Q. Mr. Long, as clerk of the Ways and Means Committee, do you have charge of the bills that are offered by the Ways and Means Committee:

A. I do.

3620 Q. Do your records show whether the recommendation of Mr. Paul that has been referred to by Judge Wells —do your records show that that was included in any bill introduced in the House?

A. I can answer that question only by a thorough check of our Bill files for the 77th Congress.

Mr. Stewart: Judge Wells, I understand that on behalf of the defendants, you have checked the records and stipulate that the recommendation made by Mr. Paul was not included in any Bill introduced in the 77th Session of Congress.

Judge Wells: Personally, I have not checked it, but [fol. 801] I have had the clerks of this office make the

check, and I am thoroughly convinced that it was not included in the final Revenue Bill as enacted by the American Congress and will stipulate with you that it was not included, but the action of the Committee shows that it was held over for future legislation.

3621 Q. Mr. Long, what was the date that Mr. Paul's recommendation was submitted?

A. The Revenue Revision of 1942, Public Hearings, Volume 1, heretofore referred to, has the published date of March 3, 1942.

3622 Q. That is the document that includes Mr. Paul's recommendation previously referred to?

A. From Volume 1, Public Hearings, that seems to be the case.

3623 Q. What was the date of the action taken by the Ways and Means Committee that has been previously referred to?

A. I can answer this question only after a thorough check of the Minutes of the Ways and Means Committee Executive Session, which minutes are not available to the public.

3624 Q. The document from which you took the page showing the action of the Committee is dated June 4, 1942, is that correct?

A. That date appears on the pamphlet.

3625 Q. Does that indicate the date that it was published?

A. That indicates the date the pamphlet was published.

3626 Q. So that the action taken by the Committee was some date previous to that?

A. That is correct.

3627 Q. Do your records show the vote of the House Ways and Means Committee on the recommendations of Mr. Paul that has been referred to heretofore?

[fol. 802] A. No public record shows that date.

3628 Q. Do you have that record in your office?

A. That vote might have been taken in several ways and a numerical count might not appear. If the same is in existence it would be in the Minutes of the Executive Session of the Ways and Means Committee and would not be available to the public.

3629 Q. Can you tell me when the 1942 Revenue Bill was introduced in the House?

A. Please repeat the question. (Question read by stenographer.)

A. The bill was reported in the House July 14, 1942.

3630 Q. And sometime prior to the date it was reported to the House by the Committee it was approved by the Committee?

A. That is correct.

3631 Q. You or your office have a record of any proposal to impose a tax on organizations that had previously been tax exempt, other than the recommendation that was made by Mr. Paul that has heretofore been referred to?

A. That question could only be answered by me after a complete check of Bill files and other records in the Committee office.

3632 Q. Do you have any independent recollection of any such provision?

A. I have no independent recollection at the moment."

3633 Mr. Crossman: The defendants, all of them, now offer in evidence the deposition of Mr. J. Harold Ryan, taken in Washington on January 18, 1943.

Thereupon Mr. Crossman read the deposition as follows:

"J. Harold Ryan of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and saith as follows:

[fol. 803] Direct examination.

By Mr. Wells:

3634 Q. State your name, residence and profession or occupation.

A. J. H. Ryan, Washington, D. C. I am Assistant Director of Censorship, on loan from The Fort Industry Company.

3635 Q. State what position or positions you hold with business organizations with which you are connected.

A. I am Vice-President, General Manager and Treasurer of The Fort Industry Company.

3636 Q. How long have you held this position?

A. Since 1928.

3637 Q. Approximately for what period of time have you been connected with the operation of radio broadcasting stations?

A. Almost fifteen years.

3638 Q. Where are the broadcasting stations located with which you are connected?

A. Our company owns six stations, WSPD, Toledo, Ohio, WMVA, Wheeling, West Virginia, WLAK, Lima, Ohio, WHIZ at Zanesville, Ohio, WMMN at Fairmont, West Virginia and WAGA at Atlanta, Georgia.

3639 Q. Do all these stations have power of at least five kilowatts?

A. No, the two stations at Lima and Zanesville are 250 watt stations.

3640 Q. The others have what power?

A. The others are all five kilowatts day and night except Wheeling, which is fifty kilowatts.

3641 Q. What has been your duty in the operation of these broadcasting stations?

A. My duty is the duty generally associated with the title of general manager.

[fol. 804] 3642 Q. Have you ever actively participated in the sale, leasing or purchasing of broadcast stations?

A. Yes, I have.

3643 Q. From your knowledge of the sale, leasing or purchasing of broadcasting stations generally in the United States, do you think you have an opinion as to the value of broadcasting stations?

A. I think I have a pretty good opinion on that subject.

3644 Q. Do you know the power, frequency and general coverage of WOW in Omaha, Nebraska?

A. It operates on 590 kilocycles, which incidentally, is the frequency of our Atlanta station, with 5000 watts power day and night, and I understand that the 1940 census gave approximately 1,000,000 radio homes within the coverage area of WOW.

3645 Q. Are you acquainted with its general reputation as a broadcasting station?

A. Yes, I know its reputation has always been very high.

3646 Q. On the basis that radio station WOW at Omaha, Nebraska, is operated on the frequency of 590 kilocycles with power of 5000 watts day and night, and is a full time station with a coverage of some 1,000,000 radio families, or some 4,000,000 people according to the United States Census of 1940, and where retail sales are approximately $1,300,000,000; that the cost of the present equipment of radio station WOW originally was $175,000, with approximate present value not exceeding $75,000, which has wholly been written off or amortized by the owner, Woodmen of the World Life Insurance Society, and that there was no oper-

ating net income from 1923, the date of its installation, until 1935, inclusive, and that the net operating income before depreciation charges were deducted for 1936 was $137,904, 1937—$204,631, 1938—$174,169, 1939—$170,653, 1940—$182,032, 1941—$212,808 and for 1942—$278,307; that a fifteen-year lease contract has been entered into between Woodmen of the World Life Insurance Society, the owner of radio station WOW, and Radio Station WOW, Inc., at a monthly rental of $8,166 per month for the first three years and $5,680 per month for the next twelve years of the term of the lease, and the agreement by the lessee to maintain said radio station WOW in first class condition, and to purchase and install at its own expense all the necessary new and additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission and of any other Federal Government agency, and to pay all city, county, state and federal taxes levied and imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee, Radio Station WOW, Inc., and at the end of the fifteen-year lease to deliver and surrender possession to all the equipment then on hand and in use by the said station to the lessor, Woodman of the World Life Insurance Society; that the present worth of the monthly rental above enumerated on a 3% basis is $910,000 and on a 4% interest basis is $855,000; and that said lease contract and assignment of radio station license for radio station WOW from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., has been approved by the Federal Communications Commission in your opinion, on the basis of the facts stated, is this an adequate lease consideration for radio station WOW?

[fol. 805] Mr. Stewart: To which the plaintiff objects as incompetent, irrelevant and immaterial, no proper or sufficient foundation laid, and calling for a conclusion of the witness.

The Court: You may answer.

"A. I would have no hesitancy in saying that it is not an inadequate consideration and it seems to me that it is very adequate and I am really surprised that it is as large a figure as you have indicated."

3647 Mr. Stewart: Plaintiff offers the following questions and answers of Mr. Ryan:

"Cross-examination.

By Mr. Stewart:

3648 Q. Mr. Ryan, I presume you are acquainted with Mr. John Gillin, manager of WOW, who is now in the room with us.

A. Yes.

3649 Q. How long have you known Mr. Gillin, approximately?

A. I must have known Mr. Gillin ten years.

3650 Q. What has been the nature of that acquaintance?

A. It has been largely through the business of radio broadcasting. Both of us have been members of the Board of the National Association of Broadcasters.

3651 Q. Are the stations your company operates affiliated with one of the chains?

A. Yes, three are affiliated with National Broadcasting Company, two with the Blue Network and one with Columbia Broadcasting System; we are quite Catholic, I would say.

[fol. 806] 3652 Q. Are you also acquainted with Mr. De E. Bradshaw, President of Woodmen of the World Life Insurance Society?

A. It seems to me I met Mr. Bradshaw once when he was with Mr. Gillin, but I did not have more than five minutes conversation with him.

3653 Q. Do you recall when that was you met him?

A. No, I do not.

3654 Q. Has it been within the past year?

A. No, I would say it was something like two or three years ago.

3655 Q. Are you acquainted with any other officials of Woodmen of the World Life Insurance Society or the station it operates?

A. No sir, I am not.

3656 Q. Who requested you to give your testimony today?

A. Mr. Gillin.

3657 Q. I assume you are receiving no compensation for testifying?

A. That is correct.

3658 Q. You agreed to testify, I suppose, because of your acquaintance with and friendship for Mr. Gillin?

A. That is correct.

[fol. 807] 3659 Q. Just as a matter of favor as he would do if your company was involved in litigation.

A. Yes.

3660 Q. Did Mr. Gillin give you the facts with reference to the lease of station WOW?

A. Yes, and I had also read them in the industry journals also. It was made public, of course, at the time the FCC approved the lease.

3661 Q. You knew, of course, that the reasonableness of the rent payable under the lease, and that the reasonableness of the lease itself, was involved in litigation in the District Court in Nebraska, and that some of the policy holders of Woodman of the World Life Insurance Society were claiming that the rental was inadequate and that the defendants, including Mr. Gillin, were claiming that the renfal was adequate.

A. Mr. Gillin informed me of that.

3662 Q. Do you know the purpose for which station WOW was originally established?

A. I cannot say that I know the particular purpose of the establishment of that station, but I suppose it falls in the general trend in similar instances, for advertising purposes. That is, in this particular instance, an insurance company, a company engaged in writing of life insurance, I suppose it would have been for the selling of life insurance and creating good will for it.

3663 Q. You have no knowledge of its true purpose?

A. No, but I assume that was it.

3664 Q. You say the station has a good reputation, how would you compare it with other stations?

A. The class of WOW is a regional station and its standing is among the forefront of the regional stations of the country.

3665 Q. What would you say with reference to the character of equipment the station has?

A. I have no knowledge on that point.

3666 Q. What would you say of the management of the station during the past years?

A. The management has always had a very high standing in the industry.

3667 Q. Would you say in your opinion that the Station was a valuable asset to the Woodmen of the World Life Insurance Society.

A. I would have no knowledge whatever on that particular point, Mr. Stewart, except that I know that radio broad-

casting does a good job for all its advertisers and I assume it has done that for Woodmen of the World Life Insurance Society.

[fol. 808] 3668 Q. Did you discuss the lease of this station or the sale of this station prior to the time this lease was made that you recall?

A. I might have mentioned it to some of my associates here, as we are all interested in anything that occurs in the industry.

3669 Q. Did Mr. Gillin at any time tell you that the Society wanted to dispose of the station, either by lease or sale?

A. No.

3670 Q. Was any effort made to interest your company in either the leasing or buying of WOW?

A. No, that is one station in the country that has not been presented to us, or that we have not considered.

3671 Q. Most of the rest have?

A. Yes.

3672 Q. Did Mr. Gillin in any conversation with you tell you why the Society desired to lease or sell its station?

A. I understood, I think particularly from Mr. Gillin's conversation and particularly from what appeared in the papers that is was a question of taxation.

3673 Q. You were never requested by Mr. Gillin or anyone else connected with the station to try to find a buyer or a lessee for the station?

A. No.

3674 Q. Judge Wells asked you a long question concerning the lease made of this station, was that question presented to you before it was read to you this morning?

A. No.

3675 Q. The gist of it had been presented to you?

A. Yes.

3676 Q. In its typewritten form as it was presented to you today, given you to consider?

A. I never saw the question, if that is what you mean.

3677 Q. What factors did you consider in forming your opinion of this lease?

A. The classification of the station with its power, its location in the market, its network affiliation and the type of coverage that a station of that particular location might be

expected to have, plus my general knowledge of what similar stations had been sold for.

3678 Q. Did you consider any other factors in arriving at your opinion?

[fol. 809] A. I think those are the prevalent factors.

3679 Q. That is all that occurs to you now anyway?

A. Yes.

3680 Q. Did you consider the ability of the lessee to pay the rent in arriving at your opinon?

A. No, I rather assumed that that would be possible.

3681 Q. That it would be able to make those payments?

A. Yes.

3682 Q. If there was some doubt about the ability of the lessee to pay the rent, then I assume it would affect your opinion.

A. Naturally it would make the lease less desirable.

3683 Q. The rent payable under the terms of the lease over the fifteen year period of the lease is approximately $1,100,000, and assuming that the lessee now has assets of approximately $100,000, would that in your opinion affect the ability of the lessee to pay the rental throughout the period of the lease?

A. No, I don't think that factor alone would affect my opinion on that point.

3684 Q. I suppose you would expect the lessee to make enough out of the station to pay the rent?

A. I assume he can, yes.

3685 Q. On the basis of the rent that the lessee is to pay, the lessee is pretty certain to make a substantial profit in the operation of the station, is it not?

A. That would be the expectation on which he would engage in the lease I assume.

3686 Q. As a radio man, in your opinion the operation of the station by the lessee should be a profitable one?

A. I think it should.

3687 Q. On the basis of net earnings given to you by Judge Wells, $278,000 in the year 1942, after the payment of the lease rentals or $97,000, it would still leave nearly $200,000 as net income to the station, would it not?

A. I believe that out of that would have to come depreciation and income taxes.

3688 Q. I believe he did except depreciation, that figure was before depreciation?

A. That figure was before depreciation and taxes.

[fol. 810] 3689 Q. Approximately what would the depreciation of that equipment be in a year?

A. I would estimate that it would run somewhere between $10,000 and $12,000.

3690 Q. Assuming that that figure of $278,000 is also without the payment of income taxes, what approximately would the income tax be to the new company?

A. I do not know anyone wise enough to answer that question. Under the present law we find in our company that income taxes takes from 60% to 70% of our earnings.

3691 Q. I suppose that in giving your attention as to the fairness of this lease you had in mind the fact that the new company would have to pay a substantial income tax?

A. That is correct."

3692 Mr. Stewart: That is all that the plaintiff offers.

3693 Mr. Crossman: Then the defendants will offer the balance which Mr. Stewart has a right not to offer. Commencing on page 9, and reading from where Mr. Stewart stopped:

3694 "Q. If the lessee would not have to pay any income tax, then naturally I assume you would place a higher value on the use of the station by the lessee?

A. Surely." (Interrupted.)

Mr. Stewart: Plaintiff objects to the further answer as not responsive to the question.

Mr. Crossman: It is your own question.

The Court: Well, we will let it go in; on the proposition that it would not be a proper foundation, the foundation is all right.

[fol. 811] Mr. Crossman: Subject to the objection?

The Court: No; state the answer.

"A. Surely. There is another factor I would like to mention in connection with this point, as it has not been covered. That is obsolescence, which is almost a more potent factor than depreciation. We are constantly faced with new developments, that fact has to be in everyone's mind when you talk about prospective profits.

3695 Q. What in your opinion, would be approximately the obsolescence which should be charged on this station, considering the equipment and its power?"

Mr. Crossman: Now, in connection with Mr. Stewart's objection, may I interpolate whatever objection he made he waived because he went on and asked these questions:

"A. There should be no immediate charge for obsolescence per se, but the industry is faced with two problems which have for the time being been put on ice, one is F-M."

Mr. Crossman: I don't know what that means.

Mr. Wells: Frequency modulation.

"A. (continued) and the other is television, and anyone in the broadcasting business has to bear in mind the fact that he must make investments in those two fields in order to keep his radio property at its earning value.

3696 Q. Is there any formula used in the radio business to determine either the rental value or the full value of a station by capitalization of its earnings, or any other normal accounting form that you know?

A. No, I have never known of any formula being developed along that line.

3697 Q. The fact that this station is affiliated with the Red Network of NBC, I presume, adds to its value?

A. Yes. I think it does.

[fol. 812] 3698 Q. What, in your opinion would be the value of the station's contract with NBC?

A. That is a very difficult question to answer because contracts periodically come up for renewal as you know, Mr. Stewart, and it is quite conceivable that a contract which might have potential value would not be so good if the contracting parties did not enter into an agreement to renew.

3699 Q. Well, this station has been affiliated with NBC for ten years, fifteen years, I believe, and assuming it continues that affiliation, what would be a fair value to place on that contract?

A. I think the value is reflected in the earnings which have been reported here. I do not believe you could place a tangible amount as one of the assets of the station.

3700 Q. Are you familiar with the leases of other stations that have been made?

A. I have known about some of them.

3701 Q. Did you have those in mind in forming your opinion as to the reasonableness of the terms of this lease?

A. Yes.

3702 Q. What are some of the other leases you have in mind?

A. I had in mind the lease that we one time made with WGHP at Detroit, now WXYZ, the lease arrangement that is in effect at WGST at Atlanta.

[fol. 813] 3703 Q. Any others?

A. No, I think of none.

3704 Q. What rent is paid by the lessee of WXYZ?

A. That was several years ago. I almost hesitate to mention that, because our company leased that station for $250 a month.

3705 Q. I presume that was a small station?

A. No, that is a regional station. At the time we operated it, it was 750 watts in power but was a regional station. It now operates with the same power that WOW does.

3706 Q. What was that station earning when you leased it?

A. The first year we operated that station we made $60,000.

3707 Q. Was it making money when you took it over?

A. No, it was not.

3708 Q. What rental does the lessee pay for WGST?

A. That is a matter of public record, and I believe the figure is $30,000. It is located in Atlanta and we happen to know of it for that reason.

3709 Q. What were the earnings of that station immediately prior to the making of the lease?

A. The station has always earned money.

[fol. 814] 3710 Q. In answering as to the value of the lease, did you consider the sales that have been made of any stations?

A. Yes, I did.

3711 Q. What sales did you have in mind, Mr. Ryan?

A. The most recent ones that come to mind are WEEI in Boston and WMCA in New York.

3712 Q. You recall what the sale price of WEEI was?

A. It was around a half million, I think—it was about $250,000.

3713 Q. Do you know what that station was earning at the time of the sale?

A. I have no record on that.

3714 Q. Do you know what the sale price was of WMCA?

A. Yes, that was around $800,000 to $850,000.

3715 Q. Do you know what the earnings of WMCA were at the time of its sale, approximately?

A. No, I can't answer that question.

3716 Q. Has it been known as a profitable station?

A. Not exceptionally, there have been times when it made money, but times when it did not do so well.

3717 Q. Do you have in mind any other sales or leases?

A. No, except our own experience.

3718 Q. Your own stations, do you own all of them?

A. Yes.

3719 Q. Have you acquired any of those stations recently?

A. The Atlanta station was our most recent station, that was in 1940.

3720 Q. What price was paid for that station?

A. $150,000.

3721 Q. Mr. Ryan, if you were the owner of station WOW and it had shown in 1942 a net profit of approximately $278,000 before depreciation and with no income taxes to pay, would you then consider a lease on the basis of the lease we have been concerned about here today—would you consider such a lease as desirable to you as owner?

A. In asking that question you are asking that I disregard any other considerations that might be in the mind of the owner that would lead him to consider the lease. I would say that it would not be very bad proposition if I [fol. 815] could be assured of the income here indicated through the ups and downs of industry and particularly the radio business.

3722 Q. I believe the figures that Mr. Wells gave you of what the station had earned before depreciation, from a low of $132,000 in 1936 up to $278,000 in 1942, which is a period of seven years, in view of that earning record do you still consider the lease made as desirable for the Society?

A. I think so, Mr. Stewart. That shows an average of approximately $190,000 gross, taking into consideration depreciation and income taxes——

3723 Q. I want you to leave out the matter of income taxes.

A. Assuming that no income tax had to be paid and taking out depreciation, I think it is a very good deal.

3724 Q. Assuming that the Society has assets of over $100,000,000 and no reason to dispose of its radio station for financial reasons, would you still consider that it was a desirable lease for the Society?

A. Well, from the facts that have been presented here, I would say it was.

3725 Q. What causes you to say that a station that made last year $278,000, before depreciation, has made a good lease when it is to receive only $97,000 for three years and then $67,000 for twelve years?

A. Here is a property that the new company takes over and is bound by its lease to keep in condition and return to its owner at the end of fifteen years, and pay the amounts stipulated as rental for the time, which guarantees the owner against fluctuation of earnings and which seems to me to be a remarkably good proposition.

3726 Q. The Society would be receiving roughly only one-third under the lease of the amount that it has made during the past year by its own operations, is not that correct?

A. That is so, but I think you know that last year's earnings are exceptionally high when compared with any earnings in the rest of the seven year period.

3727 Q. Hasn't there been a general increase in earnings of the better stations of the country in 1942 over 1941?

A. No where near the amount show here. I think most of the stations in 1942 have been fortunate to have held to their 1941 record.

3728 Q. Do you have an opinion as to the value of the station, the sale value?

A. Yes, an indefinite figure.

3729 Q. What is that opinion, Mr. Ryan?

[fol. 816] A. I would say that if that station could be sold for three-quarters of a million it would be the highest figure for a radio station in a comparable market that I know of.

3730 Q. On that basis and at that price, and assuming that the earnings continue on the same basis as they did last year, the purchase price would be paid in three years operation of the station, would it not?

A. If you don't consider depreciation or income taxes, which the new company is certainly going to have to pay.

3731 Q. Does the Government allow anything for obsolescence over depreciation?

A. No, but it is something that you have to lay up in your own mind, that is one of the things that must be considered.

3732 Q. Is that not covered to some extent by the depreciation charge?

A. No, you can get it back over a period of years after you have spent it, but you have to spend it first.

3733 Q. I believe that is all. I am not sure, Mr. Ryan, did you say you did not know what the earnings of WEEI in Boston were?

A. Yes, I do not know.

3734 Q. Do you know the earnings of station WMCA in New York?

A. Yes, I have seen the audited earnings by Haskins & Sells on that station.

3735 Q. Approximately what were they?

A. I believe they ran around $125,000. That was after, however, depreciation and taxes.

3736 Q. What did you say the sale price of that station was?

A. In the neighborhood of $800,000 to $850,000.

3737 Q. When was it sold?

A. About a year and a half ago.

3738 Q. In a general way how would that station compare with WOW?

A. It is equal in power and equal in frequency, operating on 570, the market, of course, is tremendously better, because it is the premier metropolitan market in the world. There is more competition in the market, but it still makes the coverage a great deal more desirable than the Omaha coverage.

3739 Q. Would you say that its equipment was any better than WOW?

A. No, I do not understand that it was.

3740 Q. Or its management?

A. No.

[fol. 817] 3741 Q. Or its wave length?

A. The wave length is so nearly comparable as to be almost an exact duplicate. There is one thing I might mention here, that is, that the 570 frequency is perhaps a little more cluttered than 590.

3742 Q. 570 is the New York station frequency?

A. That is right.

3743 Q. I believe that is all.

Redirect examination.

By Mr. Wells:

3744 Q. In the cross examination in reference to the income recited for 1941 and 1942, did you know that one element that entered into those incomes was the fact that radio station WOW in those two years did not have to pay some $24,000 as in former years to ASCAP for ASCAP music, by reason of a statute that was enacted in Nebraska by formal legislation.

A. Yes, I had that information. I did not know the exact amount but with the situation I am familiar.

Mr. Crossman: That is the end of the deposition.

[fol. 818] Carl A. Swanson, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wells:

3745 Q. Will you please state your name, residence and business?

A. Carl A. Swanson; president, Jerpe Commission Company and Jerpe Cold Storage Company.

3746 Q. Where is your residence, Mr. Swanson?

A. 651 North 57th Street.

3747 Q. Sometime within the past two years were you associated with other certain gentlemen considering the purchase or lease of Radio Station WOW at that time owned and operated by the Woodmen of the World Life Insurance Society?

A. I had some conversation with several of the gentlemen connected with it, yes.

3748 Q. Well, when you began those negotiations who were connected with you in this proposed transaction?

A. Mr. John Gillin came to my sons, Gilbert and Clarke, approached them on the subject, and they came to me asking what I thought of it, and Mr. Gillin explained that Mr. Bradshaw was instructed by the Board of Directors to dispose of the Woodmen of the World Station and that

Mr. Bradshaw would like to see John Gillin have an interest in it, and asked him to find some men with some money to help him acquire the Woodmen of the World Broadcasting Station.

[fol. 819] 3749 Q. Will you please state what the terms of those negotiations were as to the sale?

A. Mr. Gillin advised that the National Broadcasting Company was willing to loan some money, loan the Woodmen of the World corporation some money to buy it with, and it required around $150,000,00; the rest of it would be a first mortgage to the Woodmen of the World and a second mortgage to the National Broadcasting Company.

3750 Q. About when were those negotiations commenced, Mr. Swanson?

A. Why, I don't remember exactly; I would say it was sometime in 1941, perhaps in the fall of 1941; I do not recollect; I could not state the correct date.

3751 Q. As I understand you and your two sons, Gilbert and Clarke, gave consideration to the purchase or lease first, which?

A. Well, it developed later that the National Broadcasting Company did not go through with the commitment or their promise, and then Mr. Gillin asked us—Mr. Gillin said there was a possibility of acquiring the station by lease with an option to buy.

3752 Q. When you were considering the purchase you were advised that the National Broadcasting Company would probably loan some money on that station?

A. That is right.

3753 Q. What amount, Mr. Swanson?

A. I believe the amount was $350,000.00.

[fol 820] 3754 Q. Did they offer that or decline?

A. So I was told by John Gillin they were prepared to take a second mortgage and loan this new company $350,000.00 to be paid from the earnings.

3755 Q. Was that consummated, or did they afterwards reduce the loan?

A. For some reason or other they did not go through with their promise; they changed ideas about that loan, which Mr. Gillin can tell you more about than I can.

3756 Q. Did that break up the offer to purchase or consideration to purchase?

A. That is right.

3757 Q. Why?

A. Because we didn't have sufficient money to handle it without it, and we could see it required too much cash to handle the deal.

3758 Q. Do you know how much cash was necessary?

A. Well, I believe the amount—Mr. Bradshaw's idea was around $850,000.

3759 Q. Did you make an offer, you and your boys?

A. We did not.

3760 Q. And when the National Broadcasting Company declined to make a loan, then you—(interrupted).

A. Then the purchase idea was stopped.

3761 Q. About what time was the purchase idea abandoned?

A. I would say perhaps early in 1942 or late in 1941.

[fol. 821] 3762 Q. Did you then take up the consideration of a lease and have some discussion about it?

A. That is right.

3763 Q. What terms were talked about or considered?

A. Well, I haven't got the figures but it was based on about fifteen years, ten or fifteen years to be paid so much per month; I think the first three years was a higher amount, higher than the remaining years, and after a certain period we had an option to buy.

3764 Q. Can you tell what factors entered into that consideration that caused you not to consummate the lease?

A. Yes; we consulted our certified accountant, Mr. Greenfield, and also our attorney, and others, and they figured that based on the estimated 1942 earnings that after we paid the taxes there would only be around $25,000.00 or $28,000.00.

3765 Q. Net?

A. Net.

By the Court:

3766 Q. For how long?

A. For the 1942 earnings, after paying rental and paying the income tax, there would only be around $25,000.00 or $28,000.00 remaining.

By the Court:

3767 Q. For 1942?

A. Yes.

3768 Q. You knew what the income for 1942 was and the previous year?

A. The 1941 income was a little less than $200,000—I have forgotten the amount—and they estimated the 1942 [fol. 822] to be considerably more. It was all estimate; it was before they knew exactly what it was going to be.

3769 Q. Do you object to telling who the attorney was that you consulted?

A. No; it was Swenson, Axel Swenson who was associated with Ritchie and Swenson.

3770 Q. For what time did you consider this lease, over what period of time?

A. Well, it was either ten or fifteen years.

3771 Q. Ten or fifteen years?

A. That is right.

3772 Q. How long were you negotiating about this lease? You say the latter part of 1941 and—(interrupted).

A. I would say the early part of 1942.

3773 Q. Why didn't you make the lease?

A. Because when I learned the amount we would have to pay in income tax, it was not worth while; there was not enough there to justify you to go into a deal like that.

3774 Q. In the lease of the facilities of the radio, did you consider also the lease of the space in the building that is now occupied?

A. That is right, including the offices.

3775 Q. Do you know how much that amount was per month?

A. No, I do not. I believe it was $24,000 a year for the offices and the equipment, furniture and all that.

3776 Q. About when did you abandon the idea of making a lease?

[fol. 823] A. The early part of 1942.

3777 Q. Can you give approximately what the rental was for the radio facilities per month for the first three years?

A. No, I don't recall; it seems to me, if my memory serves me right, they figured they collect for the property around a million and a half.

3778 Q. A million and a half?

A. I think so.

3779 Q. For the facilities and the space?

A. Yes.

3780 Q. Over the term of fifteen years?

A. That is right.

3781 Q. Did you think that you could buy that or offer to pay that amount?

A. No; that was just conversation; there was no specific offer made by us, and Mr. Bradshaw never offered anything definitely; it was more or less conversation.

3782 Q. But your understanding was that Mr. Bradshaw was wanting about $850,000.00 or $855,000.00 for it?

A. On a cash basis he wanted $850,000.00, but on a payment plan he figured it considerably more.

3783 Q. When he put it on a monthly lease basis?

A. That is right.

3784 Q. Did you think that that was a reasonable price for it, cash or rental?

A. Yes; my thought was it would be a good deal for [fol. 824] somebody else but not for us for the reason we had other business and were pretty busy people at the best and didn't need this additional business.

3785 Q. You know Mr. Gillin?

A. I do.

3786 Q. What acquaintance had you and your sons with Mr. Gillin over the years?

A. I have known Mr. John Gillin since he was a little boy. I knew his father; he and I used to go to Business College at the same time; I have known the family, knew him very well, and Mr. Gillin is very friendly to my two sons. We had a lot of respect for him and were very willing to help him if we could and if we could work out a sound basis.

3787 Q. Did you and your sons decline to make the loan?

A. We did.

3788 Q. On the terms you stated?

A. That is right.

3789 Q. About what time was it you stated you declined to make the loan?

A. Well, sometime the early part of 1942 we gave up the idea.

3790 Q. Did either of your sons continue, to your knowledge, to associate other parties?

A. Yes; I think Gilbert and I sort of opposed it; Clarke contacted Mr. Horace Erickson, and he and Clarke had some negotiations with Mr. Bradshaw, I believe, but I am [fol. 825] not familiar to what extent and with what happened.

3791 Q. But you and Gilbert dropped out of the picture?

A. That is right.

3792 Q. For sale or lease?

A. That is right.

3793 Q. For the reason that you didn't think it would be beneficial to you all?

A. That is right.

3794 Q. And you understand your son Clarke then associated or attempted to with Horace Erickson?

A. Yes sir.

3795 Q. And they didn't reach an agreement?

A. That is right.

Mr. Wells: You can examine.

Cross-examination.

By Mr. Stewart:

3796 Q. Mr. Swanson, as I understand it, it was you and your two sons, one named Gilbert and one named Clarke that were negotiating for the radio station?

A. That is right.

3797 Q. And you were told that Mr. Bradshaw said the directors of the Woodmen of the World had appointed him a committee of one to dispose of the station to the best advantage?

A. Well now, I wouldn't know that he was a committee [fol. 826] of one, but he was requested to dispose of the station.

3798 Q. Well, don't you remember when your deposition was taken here in the court room, that you stated that you were informed that Mr. Bradshaw had been appointed a committee of one to dispose of the station?

A. Perhaps he was a committee of one; I think I was told at that time that he was, but there might have been more in it I didn't know anything about. He was the only one we talked to about it.

3799 Q. And Mr. Bradshaw suggested to Mr. Gillin that he find some associates to buy the property, the station, if he could?

A. That is correct.

3800 Q. And you said you had known Gillin a long time and wanted to help him, if you could; how was he to be helped in this transaction you were considering, Mr. Swanson?

A. Well, the first time we talked about buying, it was understood that in the event that we did buy it, that Mr.

Gillin would have a one-fourth interest; we would divide it four ways.

3801 Q. Would Mr. Gillin continue to manage the station?

A. Correct.

3802 Q. And you and your two sons would put up the money?

A. That is right.

3803 Q. Then after you had considered or had given up the idea of buying the property you then considered a lease of the station: is that right?

[fol. 827] A. That is correct.

3804 Q. And that contemplated that you should have an option to buy the station at some time?

A. That was talked about, yes, at a nominal price.

3805 Q. What price was mentioned?

A. I believe that Mr. Bradshaw mentioned about $50,000 at the end of fifteen years.

3806 Q. That is they were leasing the station for fifteen years and at the expiration of that lease you would have an option to buy it for about $50,000?

A. That was the conversation; there was no agreement?

3807 Q. You never did reach an agreement, did you?

A. That is right.

3808 Q. Did Mr. Bradshaw tell you you could have that option?

A. I asked him if we could have an option at a nominal price, and he said, oh, about $50,000, something on that basis.

3809 Q. Why didn't you go ahead with the deal on that basis, Mr. Swanson?

A. First of all we were told by our tax expert, Mr. Greenfield that the money paid during the period would be considered a part of the purchase price, and we may have some trouble with the Government to get by with a $50,000 purchase at the end of fifteen years.

3710 Q. That is, if you leased the property with an option to buy at the expiration of the lease, then the Government [fol. 828] might consider those lease payments as payments of the purchase price?

A. That is right, yes.

3811 Q. Then what did Mr. Bradshaw or anyone else suggest as a way of avoiding that difficulty?

A. Well, he said that the option price could be eliminated.

3812 Q. What did he say on that subject?

A. Well, I stated that I would not be interested, only if I knew we could buy it eventually, I wouldn't care for just a lease of the property, I would want to buy it. Well, Mr. Bradshaw said it could be handled O.K.

3813 Q. How did he say it could be handled O.K.?

A. Well, that was all the understanding, that it would be taken care of when the proper time came, but I told him he may not be there at that time, and I would not be interested in a deal at that time.

3814 Q. That is Mr. Bradshaw said to leave out the option provision in the written lease?

A. That is right.

3815 Q. And that he would give you his word you would have an oral option?

A. There was no deal made, but it was discussed along that line, yes sir.

3816 Q. And you were not willing to simply accept Mr. Bradshaw's oral statement that you have the option?

[fol. 829] A. That is right; it had to be approved by his attorneys and our attorneys anyway before it was a deal.

3817 Q. I believe you said that Mr. Bradshaw said that he would like to see that Gillin was taken care of in the event you got the station?

A. That is correct, and that is the only reason we went in, on account of Mr. Gillin.

3818 Q. Mr. Bradshaw said he would like to see that Gillin got a substantial amount of the company to start with?

A. That is correct.

3819 Q. Did you ever have any negotiations except with Gillin and Bradshaw?

A. No sir.

3820 Q. Mr. Gillin gave you the figures for 1941, the earnings of the station, didn't he?

A. That is correct.

3821 Q. And an estimate for 1942 which you said was higher than 1941?

A. Quite a bit higher, I believe. At that time the prospects looked good; he was telling me about different contracts that were consummated, that were bringing in good revenue, and he was quite optimistic.

3822 Q. What did he say about the future of the station?

A. Evidently he was very enthusiastic and believed he had a good prospect.

3823 Q. Did he tell you that the income of the station had [fol. 830] been increasing during the past several years?

A. I think the figures showed that; I think the earning statement—I had it at the time; they gave it to me, but I don't recall what they were.

3824 Q. Did he say he thought the increase in income would continue in the future?

A. Well, yes, any deal is just as big as you make it, and John is pretty ambitious, and he went out and got the business and brought it in there; that is what made it good.

3825 Q. Now, if it hadn't been for this income tax question, why you would have gone ahead with the deal?

A. That is correct.

3826 Q. In fact, you would have been willing to pay a good deal more if there hadn't been any income tax?

A. Yes sir.

3827 Q. After you and your son Gilbert decided not to go ahead with the deal, then I understand that your son Clarke and Mr. Erickson and Mr. Gillin worked on a deal?

A. That is right.

3828 Q. But you were not in on it?

A. I don't know a thing about that conversation.

3829 Q. Mr. Swanson, you remember when your deposition was taken in this case a month or two ago—you recall that?

A. It was not that long.

3830 Q. It was taken last month?

A. Less than a month, I believe.

[fol. 831] 3831 Q. I just ask you if you recall, to refresh your recollection, this question being asked you and this answer being given, on page 3: "Q. Who first approached you about that purchase? A. Why, I assume over a year ago John Gillin came to us and he called to our attention that Mr. Bradshaw had informed him that the directors of the Woodmen of the World appointed him a committee of one to dispose of the Woodmen of the World Broadcasting station to the very best advantage, and he suggested to John Gillin that he find some men, some associates and buy the property, if he could." Is that the answer that you gave then?

A. Yes; that is correct.

3832 Q. And that is correct?

A. Yes; that is the same as now; it isn't the same words but in effect just the same.

Mr. Stewart: Yes, that is right.

3833 Q. And then in that same connection, in your answer with reference to your deal for the station, on page 4, the middle of the page, your answer was "then you were told"——(interrupted).

Mr. Crossman: Just a minute: we object; Mr. Swanson has a right to determine this to have the question asked and the answer given, and not dip into the middle of the answer.

Mr. Stewart: Well, if you want that done——(interrupted).

Mr. Crossman: I not only want it but it is the only correct way to do it.

[fol. 832] 3834 Q. At question nine on page three were you asked this question, Mr. Swanson: "Will you please state, in those negotiations, what terms were considered?" and you answered: "Well, I don't remember any figures but I do recall that Mr. Gillin had contacted the National Broadcasting Company and they had agreed to put up a good part of that money, I think half of it—I have forgotten the dollars and cents—and we were requested to raise some money, and the rest of it could be paid, I believe, in monthly installments. Then it developed that the National Broadcasting Company decided not to go along with it. For some reason or other they concluded they were not going to put any money into this project, so that deal was off. Then we had a meeting with Mr. Bradshaw and we tried to work out a deal whereby it could be purchased on a monthly, a substantial monthly or yearly payment in a period of ten or fifteen years, giving an option to buy, and that was discussed considerable. We had our attorneys; we also had Mr. Greenfield, a certified public accountant—we called him in on it, and he developed that particularly in our case the taxes would be so high that it was hardly worth while. And then we were told that an offer to buy for a nominal sum may not hold good with the Government—you know what I mean—the income tax. Then, Mr. Bradshaw suggested it would not be necessary to have that option, saying whatever agreement he has with us would be taken care of eventually.

Well, we thought if Mr. Bradshaw was alive that was prob-
[fol. 833] ably true but if anything happened to him in ten or fifteen years and nothing in black and white, just a word from him that we could buy at such a price, we decided it was too hazardous, and we decided to leave it alone." Now, was that question asked you and did you answer it that way?

A. Yes sir.

3835 Q. And that is correct, is it?

A. Yes sir; that is exactly what it is.

3836 Q. Then was this question asked you, Mr. Swanson, question 65 on page 15: "And as I understand it, the reasons why your negotiations terminated was because Bradshaw wanted you to take his word that you could buy the station if you leased it?" and you answered: "Well, I wouldn't know the particular discussion about that, only he said that he would be perfectly willing to put that in the lease, but we were told by our certified accountant and our attorney that if we did that, showed a high rental and put a nominal fifty thousand dollars or whatever it was to terminate, with the lease and option, that we might have a little difficulty in getting by, and then Mr. Bradshaw suggested that it would not be necessary to have that clause in a lease, that it could be handled anyway. My thought was that if Mr. Bradshaw was alive I am sure that it would be handled right but we were taking too much of a chance. I felt under that setup we might lease it for ten or fifteen years and it would go back to the Woodmen of the World, [fol. 834] and that is why we were not interested in it." Is that the answer you made?

A. Yes, as I stated a few minutes ago, it was just discussion, just conversation, and any deal that was made would have to be approved by their attorneys, so it would be legal and so forth.

Mr. Stewart: I believe that is all.

(Witness excused.)

[fol. 835] GILBERT C. SWANSON, called as a witness in b half of the defendants, being first duly sworn, testified a follows:

Direct examination.

By Mr. Wells:

3837 Q. Please state your name, residence and business A. Gilbert C. Swanson; 751 North 57th Avenue; Vic president Jerpe Commission Company, Omaha.

3838 Q. Is the Mr. C. A. Swanson, who just testifie your father?

A. That is right.

3839 Q. He made reference to another son: what is h name?

A. Clarke.

3840 Q. Were you familiar with the negotiations b tween your father and your brother Clarke and yourse and Johnny Gillin concerning the purchase or lease WOW Radio Station some months ago?

A. Yes; that is correct.

3841 Q. Who was interested in that purchase or lease?

A. John Gillin, Dad, Clarke and myself.

3842 Q. With whom did you first talk about this matte

A. The first I heard of it was when Clarke mentioned to me, and he in turn had talked to John Gillin. That how it first came to my attention, and later I talked to Joh myself about it; we discussed it, all four of us.

3843 Q. Did you and your father and Clarke all discus it with Johnny?

A. Yes.

[fol. 836] 3844 Q. The general terms and so forth?

A. Discussed the conditions, that is right.

3845 Q. Did you discuss the price you could afford pay for it on a straight purchase?

A. Well, we discussed the price: Gillin at that time to us the price would be about $850,000.00, and the Nation Broadcasting Company would be willing to put up th amount—I remember $350,000.00—and take a second mor gage on the station, and the Woodmen of the World A sociation would take the first mortgage, and we, of cours would have to put up some operating capital.

3846 Q. Were you advised at that time of the income the property for the past years?

A. Yes; we were advised of that.

3847 Q. Do you recall about what that was?

A. Well, I recall—I don't recall the early years of the station but I recall the years 1940 the income was, as I remember, about a little better than $100,000.00; in 1941 it was under $200,000.00 but not very much under $200,000.00, and then the estimated 1942 earnings would be over $200,000.00.

3848 Q. What interest was Johnny Gillin to have in the organization if you did purchase it?

A. It was never exactly definitely decided on; the general understanding I had of it was it would be a four way deal, that is, each of us would be equal partners in the station.

[fol. 837] 3849 Q. Were you familiar with the physical properties of the Radio Station WOW?

A. I have never been around to see the physical properties, no. I knew in a general way what it involved but I never checked over the items of physical property.

3850 Q. Would you state how much the National Broadcasting Company was to put up in this transaction?

A. $350,000.00 was the figure.

3851 Q. Did it offer to make that loan or did it finally decline to do it?

A. They finally declined to do it. There was a period in there when John was contacting Mr. Trammell—I believe he was the president of the National Broadcasting Company—and during that period they would get them and wouldn't, just off and on, and finally they said "no" and they got off entirely, and that threw that deal out.

3852 Q. Well, you four gentlemen didn't purchase it?

A. We did not purchase it.

3853 Q. Why didn't you purchase it?

A. Well, the amount was too high, and we didn't have the money to swing the deal even if we wanted to purchase it.

3854 Q. You thought $850,000.00 was too much for it?

A. Yes.

3855 Q. After you didn't purchase it, did you consider a lease?

A. Yes, after that time when the purchase was out, we discussed a lease for the station.

[fol. 838] 3856 Q. What discussion and consideration did you give to that?

A. Well, we thought at first that it might work out advantageously, and we discussed it, the pros and cons of it, but the deal was never made.

3857 Q. Why?

A. Well, the reason it was not made was the fact there would not be enough, no money after taxes and depreciation, so we would feel it was justifiable to go into, such a large deal, and also the fact it developed we couldn't own the station anyway after the termination of the lease.

3858 Q. Did you take into consideration the future conditions, betterments and improvements you would have to make to the lease?

A. Well, we thought that a radio station would be too—there would be a lot of money to be spent for the replacement of equipment; we knew that type of equipment runs very high; we knew that television was just around the corner, a large expenditure had to be made when that time came, and we felt that the station would not have enough to it to let us build up a large enough reserve to take care of these expenditures when they would come about in the future.

3859 Q. Then the price you had to pay with the improvements you had to make, and then deliver it back at the end of fifteen years, you just thought wasn't worth the price?

A. That is correct.

3860 Q. Were you familiar with the terms of the lease?

A. Well, it was entirely a matter of discussion; there [fol. 839] had been nothing definite agreed upon.

3861 Q. Was any very definite offer made by either side?

A. No, no definite offer; we talked about some figures but it was never written down in black and white, the proposition, by one side or the other. We discussed a lease figure split up into parts, one for the office space, furniture and fixtures, as I remember the figure, $2,000 per month; and then the lease payment for the equipment, the radio equipment including the station out in the west end of town, would be $6,000.00 a month, a total of $8,000.00 a month. That is the figure we discussed at that time.

3862 Q. For the radio facilities some $8,100.00 and for the office floor space some $6,000.00 a month?

A. No, six and two.

3863 Q. Six and two instead of eight?

A. Yes.

3864 Q. Well, did you think that price would be satisfactory and beneficial in a way to you?

A. We didn't want to take that obligation on without having an option to own the station at the end of the lease; in other words, we wanted them to consider that this lease money would be partial payment of the cost of the station, and we found if we bought that way that the Internal Revenue Department would not approve it as a lease, and then it would be a sale and the whole deal therefore would be out.

3865 Q. What time was it about that you reached the conclusion that you couldn't lease it on the terms concerned?

A. Well, I think it was about the latter part of June or July, as I recall that time.

[fol. 840] 3866 Q. Your father said he and you dropped out of the proposition?

A. Yes; that was either May or July.

3867 Q. Did you have anything further to do with either a sale or lease?

A. Not after that time, no. We dropped out of it and I don't know what happened, except my brother Clarke and Erickson went into the matter further, but I don't know just what conversations they had or what happened after that time.

Mr. Wells: You may take the witness.

Cross-examination.

By Mr. Stewart:

3868 Q. Was there a corporation to be organized, Mr. Swanson, to acquire the station?

A. Yes; there would naturally be a company, a new company formed.

3869 Q. What was to be the capital of that company?

A. Well, that was one of the points in question; we never did decide what it would be. If we were on a lease basis we couldn't capitalize for more than the amount of working capital we put in and have it approved by the Internal Revenue Department.

3870 Q. What working capital did you talk about putting in?

A. Well, we first talked about $150,000.00, and later decided we could get by for less than that.

3871 Q. About how much less?

A. As I recall, $75,000.00.

3872 Q. You and your father was to put up that capital?

A. Yes; we were to put up that capital.

3873 Q. And as I understand, Gillin was to receive one-fourth of that capital stock?

[fol. 841] A. Yes; that is right.

3874 Q. That would be for his service in getting the station?

A. That is right.

3875 Q. And then you said you didn't go ahead with the lease at all because you wanted to get the station at the end of the lease: is that right?

A. That is right, yes.

3876 Q. Now, what negotiations were there about that option to purchase the station?

A. I don't quite follow you, Mr. Stewart.

3877 Q. You had some conversation, as I recall it, with Mr. Bradshaw concerning an option to purchase?

A. That is right.

3878 Q. And what was that?

A. There was never any definite offer made, any deal put in writing, as I said before, but it was generally thought that we would be given an option to purchase at the end of the lease period, and if we were given that option, then the thing would not be—the lease would be a sale and the lease payments we made would be considered part of the purchase price.

3879 Q. And therefore affect your income?

A. Income tax, decidedly.

3880 Q. That is when you were discussing having a written provision put in the lease giving you an option to purchase: is that right?

A. Yes; that is right.

3881 Q. Then Mr. Bradshaw suggested, instead of putting this option in writing in the lease he would give you his word you should have an option to purchase the sta-

[fol. 842] tion at the expiration of the lease: is that right?

A. He said that might be done that way, possibly could be arranged that way.

3882 Q. Well, he offered to do that, didn't he?

A. No; I don't think he offered to do that, because it was brought up at the time that that would be considered a sale then and these payments we made would not be considered rentals but would be considered a part of the payment price.

3883 Q. That is, if it was in writing that way?

A. Yes.

3884 Q. His suggestion was an oral option, wasn't it?

A. I don't know whether it was his suggestion or not; we wanted to know whether that could be done; I don't know whether he agreed to do it or we said we would accept it if he did; it was just a discussion.

3885 Q. What is the figure Mr. Bradshaw was mentioning for an option to purchase?

A. I believe we mentioned a figure of $50,000.00, but that was not decided would be the final figure. I believe he said whatever would be reasonable, would be a reasonable amount at the end of that period. The figures didn't make so much difference then because we knew it wouldn't work anyway.

3886 Q. To refresh you recollection, Mr. Swanson, your deposition was taken in this case last month?

A. That is right.

3887 Q. I will as- you if you were asked this question and made this answer, question 98, page 21: "Did you and your [fol. 843] associates afterwards negotiate a contemplated lease?" and your answer: "Yes; after that was out we started talking along the lines of a lease, a rental arrangement, with the further thought in mind that after the period of this lease rental arrangement we then would have a clause in our contract giving us the option of the purchase of the station at fifty thousand dollars; if the lease would run, I think it was fifteen years, we would have the option of buying that for fifty thousand dollars, until we found out it would not be acceptable to the Internal Revenue Department to be called a lease if we had the purchase agreement in it, so that went out the window." Was that question asked you and did you give that answer?

A. Yes; that is right.

3888 Q. And that correctly states the facts?

A. That is substantially what I said just now.

3889 Q. Then you were asked the question, page 30, number 150: "I understood you to say you didn't want to take the lease without the option to purchase at the end of the lease: is that right?" And you answered: "That is right." And you were asked the question: "How did that affect the transaction from your standpoint?" And you answered: "Well, if the option to purchase were put in the deal that then it would be considered, the lease would be considered a purchase arrangement rather than a lease arrangement, and the Internal Revenue Department wouldn't O.K. the deal—they might consider that the payments, the monthly payments were in part for the purchase price." Question: "Rather than as a payment for the use of the property?" Answer: "That is right." Question: "And therefore not be deductible items of expense: is that [fol. 844] right?" Answer: "Yes; that is right." Question: "As I understand it, Mr. Bradshaw said he would be willing to give his word to you and your associates that the new company should have that option?" Answer: "Yes; he indicated that." Question: "But because of the uncertainty of Mr. Bradshaw being here when the time came for you to exercise the option, you were unwilling to accept it?" Answer: "That is right." Now, were those questions asked you and did you answer them as I have read them?

A. That is correct.

3890 Q. And that is a fact?

A. That is right.

3891 Q. If the new company had not been required to pay an income tax, would it have been willing to pay a substantially higher rental than the one that you mentioned here today?

A. Yes; I would consider that it would be worth more money if that was the case.

Mr. Stewart: I think that is all.

By Mr. Massey:

3892 Q. Mr. Swanson, you testified just a few moments ago that the new corporation would have a capital of $75,000.00, and that Mr. Gillin would hold one-fourth of the stock: is that correct?

A. I said we would have paid in capital of about $75,000.00, and that there was no definite agreement made as

to how the stock would be divided, but it was assumed all the way through this deal that there would be a four way arrangement.

3893 Q. I see—the whole plan contemplated the capital [fol. 845] being advanced by the Swanson interests?

A. Yes; we didn't come to any definite understanding; I do not know whether John could put up anything or not; we knew he couldn't put up what we put up, but the chances are he would put up some money.

3894 Q. Well, how was he to get one-fourth of the stock, was it to come out of the earnings or was he to pay for it, or was there any discussion about that?

A. Yes; he was to pay for it out of the earnings of the stock.

3895 Q. And his income would be reduced until his stock was paid for?

A. Yes.

By Mr. Stewart:

3896 Q. What price was he to pay of the purchase price of his stock?

A. I don't recall there was anything definite said about that; $10,000.00 is the amount that he could get at that time.

3897 Q. Gillin, what did he say about the future earnings of the station?

A. He seemed to feel that the station had a very good future and would show good future earnings, however, he, just like the rest of us, felt there was some question about the thing due to the war conditions due to the uncertain times he couldn't promise just what the earnings would be, but he felt very hopeful about them.

3898 Q. He told you they had been increasing in past years, did he?

A. Yes.

3899 Q. And he thought they would continue to increase in the future?

A. He thought the station would have a very good future but perhaps during the war not quite so good or there might [fol. 846] be some condition come in there that we couldn't foresee at that time.

3900 Q. To refresh your recollection, Mr. Swanson, were not you asked this question, number 113 on page 25: "Well, in his opinion (referring to Gillin) as given to you, did he

indicate that the income would probably decline after 1942 or would continue to increase?" And your answer: "He didn't think it would decline after 1942; he didn't express himself as to the amount of increase it might have but he thought it would at least hold its own and might get better." Question: "He told you that it had been having a substantial growth in past years?" Answer: "Yes; he told us that." Question: "And unless something unforeseen came up it probably would continue to increase?" Answer: "That is right. Of course, nobody knew about the war situation, the effect it would have." Those questions were so asked you and you so answered them, Mr. Swanson?

A. That is correct.

Mr. Stewart: That is all.

(Witness excused.)

Thereupon an adjournment was taken until 2 P. M. of the same day, March 8, 1943.

[fol. 847] 2 P. M., March 8, 1943.

3901 Mr. Crossman: On behalf of all of the defendants, we offer in evidence the deposition of Gardner Cowles, Jr., taken in Washington, D. C. on January 18, 1943.

3902 Mr. Massey: On behalf of the defendants Radio Station WOW, Inc. and John Gillin, Jr., I join in that offer on behalf of those two.

Mr. Crossman: (Reading.)

"Gardner Cowles, Jr., of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposes and says as follows:

Direct examination.

By Mr. Wells:

3903 Mr. Wells: State your name, residence and profession or occupation.

Mr. Cowles: Gardner Cowles, Jr., my permanent residence is 50 West 37th Street, Des Moines, Iowa, and I have taken leave of absence from my private business tempo-

rarily to serve in the Government as Domestic Director of the Office of War Information. In private life I am President of the Register and Tribune Company, Des Moines, President of Iowa Broadcasting Company, Des Moines, President of WNAX Broadcasting Company, Yankton, South Dakota, President of Look, Inc., New York.

[fol. 848] 3904 "Q. How long have you held these positions, approximately?

A. Well, I have been associated with the Des Moines Register and Tribune in newspaper work for seventeen years. I have been associated with the broadcasting industry for fourteen years, and I have been associated with magazine publishing for five years.

3905 Q. Where are the broadcasting stations with which you are connected located?

A. Stations KSO and KRNT are located in Des Moines, Iowa, Station WNAX is located at Yankton, South Dakota with studios also in Sioux City, Iowa. Station WMT is located in Cedar Rapids, Iowa with studios also in Waterloo.

3906 Q. Do all of these stations have a power of at least five kilowatts?

A. All of them have five kilowatts.

3907 Q. What has been your duty in the operation of these broadcasting stations?

A. I have been in complete charge.

3908 Q. Have you ever actively participated in the sale, leasing or purchasing of radio broadcasting stations?

A. Several times.

[fol. 849] 3909 "Q. From your knowledge of the leasing, selling or purchasing of broadcasting stations generally in the United States, do you think you have an opinion of the value of broadcasting stations?

A. I think I do.

3910 Q. Do you know the power, frequency and the general coverage of radio station WOW in Omaha?

A. Approximately.

3911 Q. Have you known of its operation for some time?

A. Yes.

3912 Q. Are you acquainted with its general reputation as a broadcasting station?

A. Yes, sir.

3913 Q. On the basis that WOW, Omaha, operates on a frequency of 590 kilocycles with power of 5000 watts day and night, is a full time station with a coverage of some million radio families, some 4,000,000 people, according to the United States Census of 1940, and where retail sales are approximately $1,300,000,000, that the cost of the present equipment of said radio station originally was $175,000, with an approximate present value of not exceeding $75,000, which has wholly been written off or amortized by the owner, Woodmen of the World Life Insurance Society, and that there was no operating net income from 1923, the date of its installation, until 1935, inclusive, and that the net operating income of 1936 was $137,904, 1937—$204,631, 1938—$174,169, 1939—$170,653, 1940—$182,032, 1941—$212,807 and 1942—$278,307, before depreciation charges are deducted, and the last two years, 1941 and 1942, no payment was made for the use of ASCAP music, which in previous years had amounted to some $24,000; that a fifteen-year lease contract has been entered into between Woodmen of the World Life Insurance Society and Radio Station WOW, Inc., at a monthly rental of $8,166 per month for the first three years, and $5,680 per month for the next twelve years of the term of the lease, and an agreement by the lessee to maintain said radio station WOW in first class condition and to purchase and install at its own expense all the necessary new and additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission and of any other Federal Government agency, and to pay all city, county, state and federal taxes levied and imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of lessee, and at the end of the fifteen-year lease to deliver and surrender all equipment then on hand and in use to the lessor, Woodmen of the World Life Insurance Society; that the present worth of the monthly rental above enumerated on a 3% basis is $910,000 and on a 4% interest basis is $855,000, and that said lease contract and assignment of the radio station license for radio station WOW from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., has been approved by the Federal Communications Commission; in your opinion, is this an adequate lease consideration for radio station WOW?"

Mr. Stewart: To which the plaintiff objects as incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and no proper and sufficient foundation laid, and calling for a conclusion of law, and invading the province of the Court.

The Court: You may answer.

"A. It is."

[fol. 850] Mr. Stewart: (Reading)

"Cross-examination.

By Mr. Stewart:

3914 Mr. Stewart: Are you acquainted with Judge Wells who has just questioned you?

Mr. Cowles: I know generally of his reputation.

3915 Q. Had you known him personally before?

A. I have talked to him before.

3916 Q. Did you talk to him about the testimony you were to give?

A. He told me he wanted me to testify as to my opinion in this deal. He did not talk to me about the specific questions.

3917 Q. Are you acquainted with Mr. Bradshaw, President of Woodmen of the World Life Insurance Society?

A. Yes, I am.

3918 Q. What is the nature of that acquaintance?

A. I called on Mr. Bradshaw at one time, back in about 1935, and offered to buy WOW.

3919 Q. What contact or acquaintance have you had with him since that time?

A. None.

3920 Q. I presume you are acquainted with John Gillin who is here in the room?

A. I am.

3921 Q. What is the nature of your acquaintance with Mr. Gillin?

A. At one time I attempted to persuade Mr. Gillin to leave WOW and come to Des Moines to manage our radio stations. I have seen Mr. Gillin about twice a year at radio trade meetings.

3922 Q. About how long have you known Mr. Gillin?

A. I would say 15 or 12 years.

3923 Q. I assume you are not receiving any compensation for testifying here today?

A. Nobody has suggested it.

3924 Q. You agreed to testify simply as a favor to Mr. Gillin, who you have known for a number of years?

A. I don't know whether a favor would put it right. He asked if I thought I was competent to testify and I said yes, but said I would have to testify to whatever the facts justified my saying.

3925 Q. Did Mr. Gillin or Mr. Wells give you a copy of the long question he has read to you?

A. No.

[fol. 851] 3926 Q. Did he inform you of the litigation pending in Nebraska?

A. Yes, I kidded Mr. Gillin about that—it has been discussed in the trade for several weeks.

3927 Q. You knew the reasonableness of the rent to be paid in that lease was one question involved?

A. Yes.

3928 Q. And that Mr. Gillin and his associates claimed it was a reasonable rental?

A. Yes, I gathered that, and assuming from reading the trade press.

3929 Q. You said you knew the standing and reputation of the station?

A. I think it is excellent. I think WOW has one of the best reputations of regional stations located in markets like Omaha.

3930 Q. Do you know the original purpose of organizing or establishing the station?

A. Originally or in the years gone by?

3931 Q. Yes, originally.

A. No, I do not. I assume it was to promote the business of Woodmen of the World but I do not know.

3932 Q. Assuming that was the purpose, do you assume it has accomplished that purpose?

A. Yes.

3933 Q. Do you believe it has advertised the Society?

A. I assume that it has in that particular locality, but the Society operates on a national basis and there would be a great deal of the territory that it would not be able to reach. I happen to be a Director of Bankers Life at Des Moines that formed WHO. Although it was a regional, generally having a wider coverage than WOW; they still felt that it would not reach a large enough portion of their territory.

3934 Q. Did they dispose of that station?

A. Yes.

3935 Q. To whom?

A. The Central Broadcasting Company.

3936 Q. Do you believe, Mr. Cowles, that station WOW has become a valuable asset of Woodmen of the World?

A. There is no question about it.

3937 Q. What is the character of its equipment and facilities?

A. I have not examined its equipment for some time. I would say that its facilities are somewhat better than the average regional station located in a market the size of Omaha.

[fol. 852] 3938 Q. Are you familiar with its management?

A. Yes.

3939 Q. What is the character of its management during the past ten years?

A. I would say its management is decidedly above average.

3940 Q. Was the leasing or sale of station WOW discussed with you before this lease was made?

A. No.

3941 Q. Was it, so far as you know, discussed with anyone connected with your organization?

A. No.

3942 Q. Any effort made to lease or sell to your organization?

A. No.

3943 Q. You believe you would know it if there had been?

A. Yes, I think so."

3944 Mr. Stewart: Skipping to Page 25, the lower part of the page there. (Reading)

3945 "Q. If the lessee would not have to pay income taxes, then the net profit would be considerable more?

A. Unquestionably. It would have to pay more then for the lease, if it did not have to pay taxes.

3946 "Q. If lessee would not have to pay taxes, what would you consider a fair rental for the station?

A. Nearly double what he is proposing to pay."

3947 Mr. Stewart: And then to Page 31, the last question. (Reading)

3948 "Q. Were you or your associates interested in buying or leasing WOW last year?

A. We have not approached them and they have not ap- [fol. 853] proached us. We would have been willing to listen, certainly."

3949 Mr. Crossman: The defendants will offer that part of the cross examination of the witness included in the deposition taken by Mr. Stewart which he has omitted to offer, commencing on Page 23. (Reading)

3950 "Q. Did Mr. Gillin or anyone else connected with the station ever state to you the reason why the Society desired to lease or sell the station?

A. No. I think I should add there that I have an impression that part of it is a tax reason. At least, some of the officials of the insurance company who have a station at Nashville have discussed their problem with me. Nobody has told me, but I assume the Woodmen of the World have a similar tax problem.

3951 Q. What is the name of the insurance company at Nashville, do you recall?

A. I do not recall—National Life and Accident Company, I believe.

3952 Q. Do you know whether that is a stock company, a mutual, or a fraternal society?

A. I have an impression that it is a stock company, but I probably should not answer, as that is only a guess.

3953 Q. Is that company paying income tax on its station now?

A. No. That is, I have been told by officials of the insurance company that they are not. I have not made an examination of their records.

3954 Q. What factors did you consider in forming your opinion of the reasonableness of the rent covered by the WOW lease?

A. The earnings of the station, the hazards of the broadcasting business for the future; in fact, I think the station has just about hit its peak in earnings, its time is just about sold up to the hilt—up to the desirable time to be sold. I [fol. 854] think in the future the Federal Government, in one way or another, is likely to make demands on broadcasting stations which will reduce the amount of desirable available time for sale. I think I know something about competing advertising media, such as newspapers and magazines, and I think there will be a limit to WOW raising its rates to increase its revenue.

3955 Q. Do you have in mind any other factors?

A. Yes; I made some guesses about how heavy taxes will be in the future and what the taxes are likely to be to a shareholder. All the facts lead me to believe this is a fair price.

3956 Q. Do you have in mind any other factors you considered?

A. I think the management has been excellent in the past and a buyer could not hope to make much improvement in management. "I would say that it might be poorer for a new buyer, than I think the Woodman affiliation helps and a new buyer would not have that advantage.

3957 Q. I presume in forming your opinion you considered that the lessee would be able to pay the rent throughout the period of the lease?

[fol. 855] A. Yes. He is assuming quite a little obligation, but I guess he would.

3958 Q. If the lessee would not be able to pay, would that affect your opinion somewhat—if the lessee would not be able to pay the rental during the lease the station might cease operating, might it not?

A. This is not a direct answer, but you are asking if I regard this lease price as reasonable. The terms, in any business deal there are hazards on both sides, there are hazards in this one. Probably the best assumption is the burden of this lease might be to fulfill, but then we should assume in any lease that they might be able to pay out, but they might not be if we hit a depression, the earnings might decline sharply.

3959 Q. But you believe the lessee might make it?

A. If the Woodmen or the company being founded, of which Mr. Gillin is president, had come to me and said we want you to act as an impartial third party and fix the terms of the lease and we accept your judgment, I think I would have made the terms of the lease approximately what [fol. 856] the terms of this lease are.

3960 Q. "Would you assume—how much in assets do you believe lessee should have in order to assure payment of this rental over the period of the lease—the rent amounts to approximately $1,100,000?

A. The Federal Communications Commission will not allow anyone to carry a license as an asset, but I think anybody who is familiar with the broadcasting business knows that a license is enormously important. It gives the right to operate and equipment has very little value aside from

the license, and it is difficult, consequently, to look at a balance sheet and determine what that station is worth. If one looks at a balance sheet of the physical equipment itself, and does not consider the type of license, the equipment itself, what kind of a market it has, competition—those considerations far outweigh the value of the physical equipment.

3961 Q. Aside from the physical equipment and license itself, how much in the way of capital assets should lessee have to assure payment of rental during the period of the lease, so that it would be reasonably sure of paying the rental?

A. $150,000.

3962 Q. Do you know how much in assets the lessee does have?

A. I have no idea.

3963 Q. On the basis of rent payable under the lease, do you believe the lessee is likely to make a substantial profit on the operation of the station over the period of the lease?

A. No, I do not after he pays taxes. I think he will make [fol. 857] a "reasonable profit, with the management the station has.

3964 Q. What do you consider a reasonable profit on the operation each year?

A. $30,000.

3965 Q. In arriving at the profit that the station will probably make you mention the heavy taxes that would have to be deducted. Do you have in mind about how much the station would be required to pay in income taxes under existing law?

A. You are as familiar as I with present tax law. Assuming the station has not established any earning basis at the present time, you find it very rapidly hitting the 90% bracket, so that a substantial part of the income of the station will be required as payment of taxes. I would give it as my guess that during the term of that lease 50% of the earnings will have to go in taxes. I think it will be a good deal higher than that in the early years, but I hope the country will get on a basis where it will be down to that in the later years."

3966 Mr. Crossman: And then skipping two questions on Page 25, and then continuing on Page 25: (Reading)

3967 "Q. I believe the question Judge Wells asked reflected the earnings for the station for the past four, five or six years. In 1942 I believe the net profits were $278,000 before depreciation and without any taxes. Assuming that is correct, about what amount would be charged as depreciation on this equipment, which in the question Mr. Wells asked was fixed at $75,000?

A. That is both transmitter and studio equipment?

3968 "Q. I believe it is all equipment.

[fol. 858] A. Studio equipment should be depreciated at about 25%—I would say 25% would not be a bad figure for all of it. Radio business has been changing so rapidly that obsolescense enters and you have to take a higher percentage.

3969 Q. Obsolescense is included in depreciation, is it not?

A. It has been my experience that if you take only a minimum depreciation that is not sufficient because the stuff gets obsolete before it wears out, so if you want to be fair 25% is what I think is about right.

3970 Q. What would be the minimum if you do not consider obsolescense?

A. 12%. In Des Moines we take 33⅓% on a good deal of our equipment.

3971 Q. Do you know of any formula used in radio business in determining either lease value or sale value?

A. I have heard it discussed a great many times.

3972 Q. On what basis?

A. About five times the net earnings in recent years after taxes.

3973 Q. Is that considered to give a fair sale value of the station?

A. Yes.

3974 Q. Is there any formula that determines the lease value of a station?

A. I know of none.

3975 Q. This formula for sales value you mention, is that one generally recognized by the broadcasting business as being a reasonable basis?

A. I think so.

3976 Q. In reaching your opinion did you take into consideration the operation of other stations and the leasing and sale of other stations?

A. Yes.

3977 Q. What stations do you have in mind that were either leased or sold?

A. Well, I bought station WMT we own in Cedar Rapids, which is at the same power, operating at 600 kilocycles, nearly the same frequency, in a less desirable market, about eight years ago, I guess—maybe nine or ten years ago—for $125,000.

3978 Q. Was the station making any money before you bought it?

A. The books showed it making some money.

3979 Q. Did you find it was after examination?

A. We concluded that it was about breaking even. The [fol. 859] management was not of good quality, and we thought substantial improvement could be made with better management. More recently we purchased WNAX in a much poorer market at Yankton, South Dakota, which covered Sioux City, with 570 kilocycles. We paid $150,000 for that station five years ago.

3980 Q. Was that station making any money when you bought it?

A. I am using round figures, but that is in the neighborhood of the purchase price. What was your question?

3981 Q. Was that station making any money when you bought it?

A. Yes, a little. About $20,000.

3982 Q. What others do you have in mind?

A. The trade press reports the recent deal in New England in which John Sheppard sold a number of stations in a package for about a million and a quarter dollars.

3983 Q. Is that the Yankee chain?

A. Yes.

3984 Q. You bought some other stations, did you not, or your company?

A. Longer ago than that, I have mentioned the two most recent ones.

3985 Q. When did you buy the other stations, Mr. Cowles, and approximately what did you pay for them?

A. It is a very complicated deal and I would like to tell you about it, but I do not think it will help us, as we bought part time stations and persuaded the Commission to put them together to make full time stations, and there were a number of steps, and I do not believe that would be pertinent to this transaction. I think station WMCA on 570

kilocycles, operating in New York City, sold about four years ago for about $900,000.

3986 Q. How does that station compare with WOW?

A. It is a very different market. Of course, the market at WMCA is very much better but competition is tougher.

3987 Q. You know what the station was earning at the time it was sold?

A. I think $200,000.

3988 Q. Do you have in mind other sales?

A. Not specifically, but I have followed sales as reported in the trade press.

3989 Q. Do you know about WEEI in Boston?

A. It seems to me it sold for a million and a quarter, but that is a mere guess. I am not familiar with that station and do not even know the frequency and power.

[fol. 860] 3990 Q. Do you have in mind any other sales, Mr. Cowles?

A. Not specifically.

3991 Q. Do you have in mind any leases?

A. No.

3992 Q. The leasing of a radio station is rather unusual, isn't it?

A. Leasing you say is unusual—rather, yes.

3993 Q. What in your opinion——

A. I will mention one other sale, KNX, Los Angeles, a 50,000 watt station, was sold to Columbia Broadcasting Company for a little over a million dollars, as I recall it.

3994 Q. What is your recollection of the earnings of that station at the time it was sold?

A. I would guess a couple hundred thousand dollars.

3995 Q. Did you give me the price your company paid for Yankton?

A. $150,000. You can't state some of these things quite that dogmatically. There was a question of free time and in return there was a question of free rent on property owned by the stock company.

3996 Q. If you include that free time, approximately what was the consideration?

A. I would still say $150,000.

3997 Q. Your company made an offer on WOW?

A. It never got to the offer stage.

3998 Q. Did you talk sale at all, no price anyway?

A. No.

3999 Q. When did you say that was?

A. Early 1930s, probably 1935.

4000 Q. Were you told at that time that the station was not for sale?

A. Yes.

4001 Q. Did your company or your associates make an offer for WHO?

A. It was offered to us back in 1930, about 70% of the stock for $250,000.

4002 Q. Did you later make any offer on it, your company or your associates?

A. No.

4003 Q. What would you have been willing to pay for it?

A. As of today?

[fol. 861] 4004 Q. Yes.

A. $900,000, if I could find $900,000.

4005 Q. What are the earnings of that station, approximately, now?

A. I am guessing now, $280,000 after taxes. I think this tax angle is very important. I have a little bearing as to what tax rates will be on corporations in the future.

4006 Q. Of course, tax rates are heavy now and of course that is a factor that you have taken into consideration in testifying as to the adequacy of this lease?

A. Yes.

4007 Q. Of course, as you have already said, if the station was not subject to income taxes its value would be greater, in excess of the figures you mention, not only its rental value but its sales value as well?

A. That is right.

4008 Q. What would you say would be its sales value if not subject to income taxes.

A. You mean if the buyer would not be subject to income tax on his future operation?

4009 Q. Yes.

A. It would be nearly twice as much as if you did not need to pay the government any taxes.

4010 Q. If you were the owner of station WOW and were not required to pay any income taxes on the station, would you lease the station on the terms of this lease that has been mentioned here today?

A. I am not competent to answer that question, as I do not know what the problems of WOW are.

4011 Q. Assuming that the Society has more than $100,000,000 of assets and has no reason to get the cash, and so can hold the station, do you think it adequate?

A. If there was any danger of my total premiums being taxed as income I would give serious consideration to getting this asset out of the company.

4012 Q. Assuming there would be no tax on premium income you would not lease the station?

A. If I had no worries about taxes I would not lease the station on this basis. I am just assuming that Woodmen of the World is looking for investments.

4013 Q. If you were in the position of WOW and not required to pay taxes on income of the station, what would you consider the sale value of the station?

A. We have come back to the same point. I have testified that corporation tax rates would be about 50%. If I were certain I could avoid that 50% permanently I would say that the value of the station goes up correspondingly.

[fol. 862] 4014 Q. I believe you said it would be about double.

A. I want to make it perfectly clear here that this is a gratuitous condition, but I think insurance companies are riding for a fall if they think they are going to operate public businesses and avoid federal taxes, for I don't believe the public is going to stand for it.

4015 Q. Of course, any corporation that is now losing money could take a station making money and offset that loss against the earning station.

A. You have a very difficult question, that if you have a losing asset and put it in a corporation and get away with it. I am somewhat familiar with this——

4016 Q. I am speaking of getting an earning asset into a losing business, that is favorable.

A. Yes, that is easier also. Although it seems that every decision made by the Internal Revenue is turning out is getting more difficult every month.

4017 Q. You may have answered this, Mr. Gowles, did you place a value on WOW to a corporation that would be required to pay taxes on it? What is your opinion?

A. That would be required to pay taxes on it? I think somewhere between $800,000 and $900,000.

4018 Q. I believe that is all.

Redirect examination.

By Mr. Wells:

4019 Mr. Wells: Mr. Stewart has been asking you your opinion as to the adequacy of this price on the part of Woodmen of the World Life Insurance Society.

Mr. Cowles: Yes.

4020 Q. And assuming in securing that opinion that WOW would have a guarantee that it would not have to pay any taxes on the income from this radio station for the next fifteen years, and that they would have no other worries and would be given special privileges to operate this radio station without any liabilities except its operating expenses, is that the basis on which you made these answers.

A. Yes.

4021 Q. Are you not familiar with the fact that the Ways and Means Committee of the House at the last session of the legislature had a recommendation from the Treasury to impose a tax on corporations, such as Woodmen of the World Life Insurance Society, operating this business in direct connection with its primary business of insurance, and that the matter was held over for this session of the legislature?

A. It is my recollection that there was such a recommendation.

[fol. 863] 4022 Q. Do you know that Woodmen of the World Life Insurance Society had in mind just what you have referred to, that so long as it continues to operate a nonessential in its insurance business, that its liability to those taxes would be increased?

A. The officials should have had that in mind if they were on the job.

4023 Q. Are you familiar with the fact that just within the last four years a bill has been introduced in the Nebraska Legislature and prosecuted with much force to require by legislation the payment of such taxes?

A. That would make this deal look still better from the point of view of WOW.

4024 Q. Are you familiar with the fact that prominent officials of the State of Nebraska would like to have made Woodmen of the World Life Insurance Society pay a gross premium tax on its premiums collected from its mem-

bers, as well as a tax on this radio income if it continues to operate the station?

A. I was not aware of that.

4025 Mr. Stewart: If you were familiar with such a provision, as the officials of the Society probably were, would that make the consideration more adequate?

A. Yes."

[fol. 864] 4026 Mr. Crossman: The defendants, all of them, offer in evidence the deposition of Joseph H. Ream taken in New York on January 19, 1943.

Mr. Massey: Taken and offered on behalf of all the defendants.

Mr. Crossman: All the defendants. (Reading)

"Joseph H. Ream of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saieth as follows:

Direct examination.

By Mr. Wells:

4027 Q. State your name, residence, profession or occupation.

A. My name is Joseph H. Ream. I reside in Millstone, New Jersey. By profession I am a lawyer. At the present time I am employed in an administrative capacity by the Columbia Broadcasting System.

4028 Q. What positions do you hold with other business organizations with which you are connected?

A. Other than Columbia Broadcasting System?

4029 Q. Yes, sir.

A. I hold none. I devote my full time to that company.

4030 Q. How long have you held this position with the Columbia Broadcasting System?

A. The position that I now hold is that of a vice-presi- [fol. 865] dent and the secretary of the corporation. I have been secretary since about 1938. I was elected a vice-president in about September, 1942.

4031 Q. Approximately what period of time have you been connected with the operation of radio broadcasting stations?

A. About eight years.

4032 Q. Does the Columbia Broadcasting System own individual broadcasting stations other than its network?

A. Yes, it does. It owns—do you want me to expand that, Judge?

4033 Q. Yes.

A. It owns eight stations, all of which are a part of the Columbia network. These stations are WABC in New York; WEEI in Boston; WJSV in Washington, D. C.; WBBM in Chicago; WCCO in Minneapolis; KMOX in St. Louis; KNX in Los Angeles; and WBT in Charlotte, North Carolina.

4034 Q. What has been your duty particularly in the operation of a broadcasting system with which you are connected?

A. Prior to 1942 I was the general attorney of the company and head of its legal department, and as such participated in an advisory and consultative capacity in all phases of its business. Since the late spring in 1942 I gave up that title and those duties and have assumed general administrative or executive duties for the corporation.

4035 Q. Have you actively participated in the sale, leasing or purchasing of radio broadcasting stations?

[fol. 866] "A. I have.

4036 Q. Did the Columbia Broadcasting System recently purchase a radio broadcasting station in Boston, Massachusetts known as WEEI?

A. It did.

4037 Q. Did you participate in the purchase of this station?

A. I did, on behalf of my corporation.

4038 Q. Now, approximately what were the earnings of that station?

A. The earnings of the station run at a rate in excess of $200,000 a year.

4039 Q. What price did Columbia pay for that station?

A. $575,000.

Mr. Wells: That's all.

4040 Mr. Stewart: Are you finished, Judge?

Mr. Wells: Yes."

4041 Mr. Stewart: The plaintiff offers the cross-examination of the witness, commencing on Page 15, as follows: (Reading)

Cross-examination.

4042 "Q. Do you know any of the officers of the Woodmen of the World Life Insurance Society?

A. I do not. At least, I don't know them as such. I am pretty sure that I don't know any of the Woodmen of the World."

4043 Mr. Stewart: Wait a minute. I want to go back a little farther. I didn't start where I intended to.

At the top of Page 15: (Reading)

4044 "Q. Are you acquainted with John Gillin who is in [fol. 867] the room with us here?

A. I certainly am.

4045 Q. How long have you known John Gillin?

A. I guess I have known him casually for six or seven years.

4046 Q. What has been the nature of your acquaintance with him?

A. Purely social.

4047 Q. Is your company interested in acquiring any other stations by lease or purchase?

A. For the record—that all depends upon the circumstances.

4048 Q. I will ask you another question: Was Columbia approached in connection with its acquiring or leasing Station WOW?

A. No, not to my knowledge.

4049 Q. Well, if it had been, you probably would have known, wouldn't you, as a vice-president and attorney?

A. I might well have known, although not at all certainly. There may have been an approach to another officer of the company and I can—it is perfectly probable that if such an approach were made, that officer being familiar with the situation in which we have found ourselves in recent years where we have had two proposed acquisitions turned down by the F. C. C. and a pretty definite indication that it would be difficult for us to get license transfer approval—under those circumstances any officer approached might well have said, 'We don't think

we can get it approved, hence we aren't interested.' The Federal Communications Commission would have to approve a transfer of leasing.

[fol. 868] 4050 "Q. Would you have been interested in the acquisition of WOW if you had gotten it at a reasonable price and believed that you could get consent of F. C. C. to the assignment of the lease?

A. Yes, we would, although our interest in WOW would have been somewhat less than it would have been in the case of KNX, WBBM, WABC, WEEI and WJOV for the reason that these stations in each case serve as a key station or nucleus for certain program productions and commercial operations."

Mr. Crossman: The defendants, and all of them, now offer the remainder of the cross-examination asked by Mr. Stewart at the time of the taking of the deposition, which he has not offered here at the trial, commencing on Page 6 of the deposition.

The Court: Whose deposition is it?

4051 Mr. Crossman: Joseph H. Ream, vice-president of the Columbia Broadcasting Company, the same one, taken in New York on January 9, 1943.

4052 The Court: Oh, yes.

4053 Mr. Crossman: (Reading).

4054 "Q. Was there any other consideration other than the $575,000? Any free time, or any——

A. There was no free time. We, as a part of the deal—or rather in connection with the deal—we leased office space from the seller. The seller was the Boston Edison Com-[fol. 869] pany which is the owner of a large building on Tremont Street, facing the Boston Common in Boston,—and we leased three floors in that building for studios and offices for the station.

4055 Q. When did you acquire that station, Mr. Ream?

A. We purchased it in August, 1942. Prior to that time we were the licensee of the station, pursuant to a lease.

4056 Q. How long had you operated it as licensee?

A. Since 1937.

4057 Q. You said its earnings were over $200,000 a year?

A. I said they run at that rate.

4058 Q. What were the earnings for the year 1942?

A. I don't know. We have not been audited.

4059 Q. 1941, approximately?

A. I can't give you that figure, Mr. Stewart, for this reason, and this also applies I should say to 1942. Columbia Broadcasting System, as a single corporation, operates the network,—the Columbia network,—and also operates these eight stations that I have mentioned. Consequently, we have no unassailable basis for breaking down the earnings of the component parts, which go into the same corporate pocket let me say.

4060 Q. But you do have figures that would show approximately what the earnings of each of these stations are?

A. For statistical purposes I would say that is correct,—for the purposes of our own internal organization.

4061 Q. Do you know approximately what the earnings of the station were prior to the time you leased it?

A. I do not.

4062 Q. Was it earning——

A. (Interrupting:) It was earning something, but not nearly as much as after we got it,—I am convinced of that, although I don't just know.

4063 Q. Has its earnings increased progressively since you took over the station?

[fol. 870] A. Not uninterruptedly by any manner of means.

4064 Q. Have they each year increased over the preceding year?

A. No, sir; not by any means. We had one or two bad years.

4065 Q. Do you remember what years?

A. 1938 was one of them.

4066 Q. And the other?

A. I don't now remember,—let me put it that way.

4067 Q. Was 1942 a good year for the station?

A. I think it was. It has been a good year, relatively speaking, in radio.

4068 Q. Did your lease have an option to purchase?

A. Not a true option. It did contain—You are talking about the 1937 lease?

4069 Q. That's right.

A. Not a true option. It did contain a provision that if the Edison Company wished to sell it during the continuance of the lease they would give us a right of what we colloquially call 'a first refusal,' but it was no true

option in any sense of the word, and I as a lawyer was never very well satisfied that that meant anything.

4070 Q. When did your company acquire WABC approximately?

A. I will have to make a guess on that. I think it was 1928.

4071 Q. Do you recall whether that station was making money when you purchased it?

A. I have no idea. Probably not, but I just don't know. Needless to say it has made a lot of money since we have had it.

4072 Q. Are any of these stations on the market now?

A. Any of which? Of the eight?

4073 Q. Of the eight.

A. No, and they won't be unless these rules go into effect. I would like to clarify that—in other words, we won't sell them unless we are forced to,—I hope.

4074 Q. What did your company pay for WABC?

[fol. 871] A. I don't know, Mr. Stewart, I just don't know.

4075 Q. Do you know approximately?

A. Probably less than a half million dollars, but I don't know. When we bought it, it certainly wasn't operating a 50,000 watts power and was—but I think the question should show that I just don't know what we did pay for it—the answer should show that, I mean.

4076 Q. When did you acquire WBBM?

A. That was a little later than our acquisition of WABC but that also I can not be certain of. I would guess,—I would guess that was in the very early thirties,—maybe 1930 or 1931, I don't know,—along in there. It was after WABC, I am sure.

4077 Q. Do you know whether that station was making any money when you bought it?

A. My guess is that it was making a rather substantial sum of money, but again I can't give you figures on that.

4078 Q. Do you recall how much your company paid for it?

A. I don't know.

4079 Q. Or approximately?

A. Some hundred of thousands; I would guess, also less than half a million dollars.

4080 Q. When did your company acquire WCCO approximately?

A. In the same general period as our acquisition of WBBM.

4081 Q. Was that station making money when you acquired it?

A. Yes, it was; I am sure.

4082 Q. Do you know what you paid for it?

A. No. I knew at one time. My recollection is we paid a very substantial sum of money for that, probably in the neighborhood of $500,000, which at that time was quite a lot of money, I think, for a radio station.

4083 Q. When did you acquire KMOX?

A. In the same general period,—early thirties, I believe.

4084 Q. Was that station making money when you acquired it?

[fol. 872] A. I think that it was. I think it was probably quite a valuable property when we acquired it.

4085 Q. Do you know what you paid for it?

A. I think I can guess a little closer on that than I have on these other —and my recollection now,—and I don't believe it is more than fifty or $75,000 off,—is that we paid $475,000 for it.

4086 Q. When did you acquire KNX?

A. KNX we acquired much later. We acquired that in the fall of 1936.

4087 Q. What did you pay for that?

A. I can give you the figure of that with a greater degree of accuracy than these others—$1,200,000.

4088 Q. Was that station making money when you acquired it?

A. It certainly was.

4089 Q. How much before you acquired it approximately?

A. I can't give you—my recollection on that,—but it was —oh, I think it was around $200,000 a year, but I don't exactly remember. I might add on that that our acquisition of KNX was under circumstances which justified this price to us when it probably wouldn't have justified that price to anybody else. We, as a network organization owned no station on the Pacific coast at that time; more and more shows were being originated in Hollywood, which was a talent center, and we were at a disadvantage,—a decided competitive disadvantage with the National Broadcasting Company because they owned stations in San Francisco and had certain arrangements with stations in Los Angeles

which gave them an 'in', we thought, which we wanted to possess. For that reason KNX was a very desirable purchase for us, quite irrespective of earning capacity.

4090 Q. And when did you acquire WBT?

A. That, I think, was in the same general period as our acquisitions of WBBM, WCCO and KMOX,—early thirties, I believe.

4091 Q. Was it earning money when you acquired it?

[fol. 873] A. In that case I don't believe that it was.

4092 Q. What did you pay for it?

A. My recollection falls down here,—but my recollection for what good it is, is that it was less than $200,000.

4093 Q. Now, are there any other stations that your company has acquired in recent years,—other than those that you have mentioned?

A. No, not in recent years,—not other than the eight I have mentioned.

4094 Q. The Witness: Have you asked me about all eight?

Mr. Stewart: Yes.

4095 Q. Are there any that your company has leased in recent years?

A. What do you mean recent years?

4096 Q. Well, in the last five years?

A. No.

4097 Q. Any in the last ten years?

A. Yes.

4098 Q. What ones?

A. WPG in Atlantic City.

4099 Q. When did you lease that?

A. I don't remember and it is—we gave up the lease, oh—six or seven years ago,—shortly after I came with Columbia.

4100 Q. What rental did you pay for that?

A. I don't know, but it was very small, and the station there wasn't worth anything to us really.

4101 Q. Well no——

The Witness (interrupting): I don't want to mislead you. We did own a station in Cincinnati which we disposed of about four years ago when we affiliated a 50,000 watt station with the Columbia network. We sold it to the Taft interests. The corporate name of the purchaser I don't remem-

[fol. 874] ber, but it publishes a newspaper in Cincinnati.

4102 Q. What was the designation of the station?

A. WKRC.

4103 Q. What was the sale price, do you recall?

A. I can recall within $5,000. It was either $320,000 or $325,000.

4104 Q. Was it making money at that time?

A. It may have been making a little bit, but my recollection is that it was more nearly pretty much on the line. The situation in Cincinnati, I might add, is a very bad one for any but one station—that is, WLW—which completely dominates that market.

4105 Q. Now, you don't have with you any of the figures on the purchase price or earnings of any of these stations, of course?

A. I have—the only figure I have is the one that I testified to on WEEI.

4106 Q. Those figures are, I presume, all in the records of your company?

A. The purchase price is. The earnings, I don't know that you will be able to get for the reason that I stated before."

Mr. Crossman: Beginning at the top of Page 15, Mr. Stewart read the cross examination and continued through Page 16, and continued through the first answer on Page 17. Now, beginning on Page 17, the first question, which was not read by Mr. Stewart: (Reading)

4107 "Q. Now, Station WEEI that you recently acquired, I believe you said was making money when you acquired it?

A. That is my recollection, although we weren't—you will have to—before I answer that question you will have to. [fol. 875] define the word acquired.

4108 Q. I mean when you purchased it.

A. Oh, sure; it was making money when we purchased it.

4109 Q. Now, when you purchased it, I presume your company had in mind that it would have to pay income tax?

A. The corporation would have to pay income tax on its entire earnings—let me put it that way more accurately.

4110 Q. Which would include the earnings of that station?

A. Yes.

4111 Q. Under the present law, what per cent, approximately, would your company have to pay on the earnings

of that station when it is placed on top of your other earnings?

A. I think around 45%. That is my recollection.

4112 Q. Your company doesn't get into the higher brackets of per cent?

A. I don't believe it will in 1942."

4113 Mr. Crossman: That is, on Page 18 concludes the cross examination of Mr. Ream, and I will proceed with the redirect examination, by Mr. Wells.

"Redirect examination.

By Mr. Wells:

4114 Q. Will you please state the power of these respective stations that you have enumerated owned by C. B. S.?

A. The power of all of them, except WEEI, is 50,000 watts both day and night. The power of WEEI is 5,000 watts, day and night.

4115 Q. Of what frequency is WEEI?

A. WEEI is on 590.

4116 Q. That is the same frequency as WOW in Omaha?

A. I don't know the frequency of WOW.".

(Witness excused.)

[fol. 876] 4117 Mr. Massey: All of the defendants offer in evidence the deposition of Harold V. Hough, taken on written interrogatories submitted by all of the counsel in this case.

4118 Mr. Crossman: These were taken on interrogatories in writing, so I will read the interrogatories, and you read the answers.

(Questions read by Mr. Crossman, and answers read by Mr. Massey, as follows:)

[fol. 877] "Harold Hough of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows:"

Mr. Crossman: The answers are not on the instrument that I have.

"Direct examination.

By Mr. Wells:

4119 Q. Mr. Hough, please state your name, residence and profession or occupation.

A. My name is Harold V. Hough. I reside in Fort Worth, Texas. My profession or occupation is that of treasurer of Carter Publications, Inc., Circulation manager of such company, and general manager of the radio properties for such company.

4120 Q. State what position or positions you hold with other business organizations with which you are connected, if any.

A. I am, also, president of the Oklahoma Broadcasting Company, Inc., which company owns and operates Radio Broadcast Station KTOK, located in Oklahoma City, Oklahoma. I am chairman of the operating committee of the Lone Star Chain and a director of the Texas Quality Network and of the Oklahoma Network. I am chairman of the newspaper-radio committee.

4121 Q. Approximately how long have you held these relationships?

A. I have been circulation manager of the Fort Worth Star-Telegram for thirty years; treasurer of Carter Publications, Inc. about fifteen years; manager of the radio division since its inception in 1922. I have held offices in [fol. 878] the other offices for a period of from three to twelve years.

4122 Q. Approximately for what length or period of time have you been connected with the radio broadcasting industry?

A. I have been connected with the radio broadcasting industry since its inception in the year 1922; Radio Station WBAP since 1922; Radio Station KGKO since 1935; Radio Station KTOK since 1936.

4123 Q. What power does each of the radio broadcasting stations with which you are connected have?

A. WBAP 50,000 watts; KGKO 5,000 watts; KTOK 250 watts.

4124 Q. In your official connection with the radio broadcasting industry have you had active charge in the administration of these radio broadcasting stations?

A. I have.

4125 Q. Have you actively participated in the sale, leasing or purchasing of any radio broadcasting stations?

A. I participated in the purchase of Radio Station KGKO for this company. I purchased Radio Station KTOK for myself.

4126 Q. Have you had knowledge of the sales and leases generally throughout the United States of broadcasting stations other than those with which you have been directly connected?

A. A trade paper knowledge.

4127 Q. Do you know the power, frequency, general coverage and general reputation of Radio Station WOW in Omaha, Nebraska?

A. I do.

4128 Q. On the basis that Radio Station WOW, Omaha, [fol. 879] operates on a frequency of 590 kilocycles, with power of 5,000 watts day and night and is a full time station with a coverage of some million radio families, or some four million people according to the United States census of 1940, and that retail sales in said coverage are approximately one billion three hundred million dollars; that the cost of the present equipment originally of said Radio Station WOW was $175,000.00 with approximate present value of $75,000.00, which has wholly been written off or amortized by the owner; that there was no operating net income from 1923, the date of its installation, until 1935, inclusive; that the net operating income for 1936 was $137,904.00, 1937 $204,631.00, 1938 $174,169.00, 1939 $170,653.00, 1940 $182,032.00, 1941 $212,807.00, 1942 $278,307.00, before depreciation charges are deducted, and the last two years of 1941 and 1942 the station did not pay any sum to ASCAP for ASCAP music which it had previously paid annually in a sum of more than $20,000.00; that a fifteen-year lease contract has been entered into between the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc. at a monthly rental of $8,166.00 per month for the first three years, $5,680.00 per month for the next twelve years for the term of the lease, and the present worth of the fifteen-year rental on a four per cent interest basis is $85,900.00, and on a three per cent basis $910,000.00; and the agreement by the lessee to maintain said Radio Station WOW in a first-class condition and to purchase and install [fol. 880] at its own expense all the necessary new and

additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, or of any other federal government agency, and to pay all city, county, state and federal taxes levied or imposed during the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; and at the end of the fifteen-year lease to deliver and surrender possession of all of the equipment then in use and join an application to the Federal Communications Commission for transfer of the license back to the Woodmen of the World Life Insurance Society, and that the said lease contract and assignment of Radio Station License for Radio Station WOW from the Woodmen of the World Life Insurance Society to Radio Station WOW, Inc. has been approved by the Federal Communications Commission on the basis of these assumed facts, is it your opinion that this lease rental for a period of fifteen years is an adequate consideration for this station?"

Mr. Stewart: The plaintiff objects for the reason it is incompetent, irrelevant, immaterial, no proper and sufficient foundation laid, calling for a conclusion of the witness, and particularly a conclusion of law and invading the province of the Court.

The Court: You may answer.

"A. Most adequate.

[fol. 881] 4129 "Q. Will you please state fully the reasons for your answer to the last foregoing question, and state the business reasons that govern your opinion, and also state from your knowledge the lease or sale price for which other stations have been transferred, with their power, coverage and income?

A. In considering the broadcasting business generally—the hazards of it—the uncertainties of it—the constant change in it—and the coming post-war development of the related methods of broadcasting, such as television, frequency modulation and facsimile, it appears to me that we are at this time confronted with a new area of exploration and development. In order to keep pace, the operators of a first-class broadcasting station will be obliged to enter into these related fields by pioneering, developing and carrying forward during an experimental age, which will be

expensive, and the returns, if any, are quite a ways down the road—all of which places an obligation upon the owners and operators of broadcasting stations, which will consume what might otherwise be earnings. And this is one of the reasons why I think the consideration mentioned in this question is most adequate. I have another reason. It appears to me that this lease contract is somewhat out of balance. It seems to me that the Woodmen Society, in inserting what I construe to be a recaptured clause, namely, to take the station back at the end of this lease, is a little one-sided. I think the lessee, considering the amount he is paying for the lease, ought to have an option to pur-
[fol. 882] chase the station at the expiration of the lease; therefore, the lessee is surely paying a most adequate price, particularly when no option for ultimate purchase and of obtaining title to the physical property is given. I base this again on the post-war developments ahead of us. The lessee will be obliged to enter into these new fields, which will require much money. If he does this well, and the station at the end of the lease has the same prestige it has now and is maintaining and operating these new features about the time they are well established, the Society can step in and recover the efforts of their years of experimentation and development. This, and the inevitable coming heavy taxes, makes it appear to me that the price is not only most adequate, but high."

4130 Mr. Stewart: The plaintiff offers the cross interrogatories and the answers of the witness, as follows:

(Mr. Slocum reads the questions, and Mr. Stewart reads the answers.)

"Cross-examination.

By Mr. Stewart:

4131 Q. Are you acquainted with John J. Gillin, Jr., manager of Radio Station WOW or with De E. Bradshaw, president of Woodmen of the World Life Insurance Society, or any other officials of that company? If so, state fully the nature and length of such acquaintance with each.

A. I am acquainted with John J. Gillin, Jr., and have
[fol. 883] known "him for a period of more than ten years. The nature of my acquaintance with such gentleman is that

built up over a period of years attending conventions, trade associations and the like. I am not acquainted with Mr. De E. Bradshaw, or any other official of that company.

4132 Q. Are you a member of any organization, group or committee of parties interested in broadcasting and of which Mr. Gillin is a member? If so, state full the facts.

A. I am a member of an organization interested in broadcasting and of which Mr. Gillin is a member; namely, the National Association of Broadcasters.

4133. Q. Who requested you to testify, and are you testifying because of such request?

A. Three or four weeks ago Mr. Gillin phoned me long distance and asked if I would consider making a deposition. I told him I would think it over and wire him. A day or two later I wired him I would. I am testifying because of such request.

4134 Q. Are you receiving any compensation for testifying today? If so, state the facts.

A. No.

4135 Q. Were you told by anyone that the adequacy of the lease rental of Station WOW was involved in litigation? If so, by whom?

A. Mr. Gillin told me that. Later, a Mr. Braden told me that.

4136 Q. Were you told that the lessor and lessee of Station WOW were claiming that such rental was adequate? If so, by whom?

A. I was—by Mr. Gillin.

[fol. 884] 4137 Q. Was a lease or sale of Station WOW discussed with you by anyone connected with the station or the Woodmen of the World Life Insurance Society prior to October 3, 1942? If so, state when, where, with whom and the substance of the conversations.

A. Such matter was never discussed with me.

4138 Q. Will you state all factors that you considered in forming the opinion that you have given with reference to the adequacy of the lease rental of Station WOW?

A. I think I set out the principal factors I have taken into consideration in answer to the question a moment ago, which I think was number eleven.

4139 Q. Did you, in forming your opinion, assume that the lessee would be able to pay the lease rental throughout the period of the lease?

A. I did.

4140 Q. If there were some doubt as to the ability of the lessee to pay such lease rental, would it affect your opinion? If so, state how.

A. It would.

4141 Q. In your opinion, is the lessee reasonably sure to make a substantial net profit throughout the period of the lease?

A. The interpretation of which is a substantial profit might be a matter of opinion. I think the lessee will make a fair profit but not an elaborate one. I consider that Mr. Gillin, with his contacts in the advertising field are such that if there is any business at all, WOW will in the future, [fol. 885] as in the past, have its full share. If there isn't any business at all—well, there is no need to go into that.

4142 Q. What, in your opinion, will be approximately the net profit of the lessee before income taxes?

A. This question is a little vague, as it does not cover any specified time. Conditions change from year to year—and, again, we must consider the post-war expense of development, and that may cut down, and no doubt will cut down, profits from those which have been registered in the immediate past few years.

4143 Q. What, in your opinion, will be approximately the income tax payable by the lessee on such net profit under the Revenue Act of 1942?

A. Probably about two hundred thousand dollars.

4144 Q. If the lessee did not have to pay any income taxes from its net profit, what, in your opinion, would then be a fair lease rental for Station WOW?

A. A great deal more—maybe twice more. It's hard to forecast when there is so much supposing to it.

4145 Q. State, if you know, the reputation and standing of Radio Station WOW and its management up to the present time.

A. It is excellent.

4146 Q. State, if you know, whether the operation of Station WOW has been helpful or injurious to the Woodmen of the World Life Insurance Society up to the present time, and in what ways.

A. I am hardly qualified to answer, as I know very little [fol. 886] about the insurance business. But it appears to me, however, that in the area covered by the station, it has given prestige to the Society.

4147 Q. State, if you know, the reputation and standing of Radio Station WOW in Texas up to the present time, and whether it has been helpful or injurious to the Woodmen of the World Life Insurance Society, and in what ways.

A. I have never heard listeners in Texas refer to programs they have heard on WOW. Considering its coverage, there is no reason why they should comment on WOW because I don't see how it can have any sort of an audience in Texas.

As to the question, in reference to it being helpful to the Society in Texas, I can only answer by calling attention to a situation I have found in the distribution of our newspapers. We circulate in a rather extensive area. Time and geography are factors. We constantly receive complaints from subscribers in outlying districts that they are not receiving as good a newspaper—as complete a newspaper—as those subscribers residing closer to the publication office. And this is true. There isn't much we can do about it, because it is a factor, as I said a moment ago, which is governed by time and distance.

If the members of the Society in Texas have ever heard that the Society has a broadcasting station located at the home office, it would be only natural that many of them would feel that they were being slighted. If the Woodmen [fol. 887] operate a station for the enjoyment and entertainment of the members at the home office and near the home office, then they might feel that their equal rights were being slighted; however, I don't think this would be injurious to the Society; neither do I think it would be helpful. I should think that WOW would probably be just a negative force in Texas.

4148 Q. In reaching your opinion as to the adequacy of the lease rental of Station WOW, did you consider the lease or sale of any other stations? If so, name such stations.

A. No, I did not, because conditions more than money govern in these matters—location of the station, market, the reputation of the station, and the operating personnel.

4149 Q. State, if you know, approximately the sale price or the lease rental of each of such stations and the gross and net income of each such stations.

A. I believe the above answer also answers this.

4150 Q. State, if you know, whether the net income which you have given as to each of such stations was before

or after income taxes were deducted and approximately the amount of such income taxes.

A. Also the above answer would apply here, I think.

4151 Q. State whether you have had conversations or communications, either oral or written, with anyone regarding your answers to any of the foregoing interrogatories, either on direct examination or cross examination. If you have, state when, with whom and the substance of such con- [fol. 888] versations, or communications, and attach copies of any written communications received by you.

A. Yes. As I stated above, Mr. John J. Gillin, Jr. called me on the telephone to determine whether or not I would be willing to testify in this case, and I subsequently wired him that I would. Later, a Mr. W. C. Braden wired me he would see me on a certain Monday, I believe it was, but his train was late and did not arrive until the following day. He came to my desk, and we talked fifteen or twenty minutes. I was called away. I never got to see him any more. I think I really owe him an apology."

(Witness excused.)

Mr. Stewart: That is all, and there are no copies of any written communications attached to the deposition.

4152 Mr. Crossman: The defendants, and all of them, offer the deposition of J. O. Maland, taken at Des Moines, Iowa, February 17, 1943. (Reading)

[fol. 889] J. O. MALAND, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and saith as follows:

Direct examination.

By Mr. Wells:

4153 Q. Mr. Maland, please state your name, residence and profession or occupation.

A. My name is Joseph O. Maland, residing at 912 California Drive, Des Moines, Iowa. My occupation is Vice President and Manager of Radio Station WHO, Des Moines, Iowa.

4154 Q. State what position or positions you hold with other business organizations with which you are connected, if any.

A. I am also a member of the Board of Directors of Radio Station KMA, Shenandoah, Iowa and a member of the Executive Council of such Board handling the operations of the Station.

4155 Q. Approximately how long have you held these relationships?

A. Vice President and Manager of WHO since 1934, and a member of the Board of Directors of KMA since 1940.

4156 Q. Approximately for what length or period of time have you been connected with the radio broadcasting industry?

A. Nineteen and one-half years.

4157 Q. What power does each of the radio broadcasting stations with which you are connected have?

A. WHO has 50,000 watts. KMA has 5,000 watts day and 1,000 watts night.

[fol. 890] 4158 Q. In your official connection with the radio broadcasting industry, have you had active charge in the administration of these radio broadcasting stations?

A. Yes.

4159 Q. Have you actively participated in the sale, leasing or purchasing of any radio broadcasting stations?

A. I have participated in the purchase of a minority interest in one radio station.

4160 Q. Have you had knowledge of the sales and leases generally throughout the United States of broadcasting stations other than those with which you have been directly connected?

A. Yes. It is part of my business to keep informed of developments in the radio industry and, therefore, have studied carefully trade press reports of various sales and leases during the past 10 years; have attended hearings before Federal Communications Commission on some sales as an observer and also have read the reports of the Federal Communications Commission on the disposition of many cases. Our Company has also made independent investigations of various proposed and completed sales.

4161 Q. Do you know the power, frequency, general coverage and general reputation of Radio Station WOW in Omaha, Nebraska?

A. Yes.

[fol. 891] 4162 Q. On the basis that Radio Station WOW, Omaha, operates on a frequency of 590 kilocycles, with

power of 5,000 watts day and night and is a full time station with a coverage of some million radio families, or some four million people according to the United States census of 1940 and that retail sales in said coverage are approximately one billion three hundred million dollars; that the cost of the present equipment originally of said Radio Station WOW was $175,000.00 with approximate present value of $75,000.00 which has wholly been written off or amortized by the owner; that there was no operating net income from 1923, the date of its installation, until 1935, inclusive; that the net operating income for 1936 was $137,904.00, 1937 $204,631.00, 1938 $174,169.00, 1939 $170,653.00, 1940 $182,032.00, 1941 $212,807.00, 1942 $278,307.00, before depreciation charges are deducted, and the last two years of 1941 and 1942 the station did not pay any sum to ASCAP for ASCAP music which it had previously paid annually in a sum of more than $20,000.00; that a fifteen-year lease contract has been entered into between the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc. at a monthly rental of $8,166.00 per month for the first three years, $5,680.00 per month for the next twelve years for the term of the lease, and the present worth of the fifteen-year rental on a four per cent interest basis is $855,000.00, and on a three per cent basis $910,000.00; and the agreement by the lessee to maintain said Radio Station WOW in a first-class condition and to purchase and install at its own expense all the necessary new and additional equipment, machinery and devices to enable it to conform to the rules and regulations of the Federal Communications Commission throughout the term of the lease, or of any other federal government agency, and to pay all city, county, state and federal taxes levied "or imposed during [fol. 892] the term of the lease, and to keep the property adequately insured, with no option to purchase on the part of the lessee; and at the end of the fifteen-year lease to deliver and surrender possession of all of the equipment then in use and join an application to the Federal Communications Commission for transfer of the license back to the Woodmen of the World Life Insurance Society, and that the said lease contract and assignment of Radio Station License for Radio Station WOW, Inc. has been approved by the Federal Communications Commission on the basis of these assumed facts, is it your opinion that this lease

rental for a period of fifteen years is an adequate consideration for this station?"

Mr. Stewart: That is objected to for the reason it is incompetent, irrelevant and immaterial, no proper and sufficient foundation laid, calling for a conclusion of the witness, and particularly a conclusion of law, and invading the province of the Court.

The Court: You may answer.

"A. In my opinion, I believe that the lease rental as outlined above is more than adequate and more than could be secured by rental to other people in the radio industry.

4163 Q. Will you please state fully the reasons for your answer to the last foregoing question, and state the business reasons that govern your opinion, and also state from your knowledge the lease or sale price for which other stations have been transferred, with their power, coverage and income?"

Mr. Stewart: The plaintiff objects for the reason it is incompetent, irrelevant, immaterial, and no proper and [fol. 893] sufficient foundation laid, hearsay testimony, and the answer which appears in the deposition shows that it is largely based on hearsay testimony.

The Court: It is received for what it is worth.

"A. My answer to the question would be from the standpoint of a practical broadcaster desirous of acquiring a radio station in the Omaha market with a reasonable knowledge of the conditions and the hazards in such an enterprise.

My first interest would be to determine the future possibilities for earnings and expansion of facilities by analyzing the probable competition that might be established by other radio stations in the area, the possibilities of the limitation of coverage by the establishment of other stations [fol. 894] on the same frequency in other parts of the United States, the future needs for not only replacement of equipment but the development of new methods of transmission such as frequency modulation and television and, finally, the how such an acquisition would fit in to whatever other business enterprises I might have. I know some of the future possibilities of competition in the Omaha market, most of which are a matter of public record. KFAB,

Lincoln, Nebraska, applied for and made arrangements to increase their power to 50,000 watts, moving their transmitter within sixteen to twenty miles of Omaha, and have been delayed in completing such arrangements by the shortages created under war conditions. It is also a matter of public record before the Federal Communications Commission that the Omaha World-Herald entered into contracts under optional agreements for the purpose of acquiring KFNF, Shenandoah, Iowa, acquiring their equipment and license, moving the station to Omaha and by special arrangements with KUSD, Vermillion, South Dakota, acquiring full time on that frequency. It is rumored that negotiations for completion of such a transfer are now going on. It is obvious that an organization like the Omaha World-Herald is eventually going to get full time on some frequency either by purchase or by pressing their present application for full time on 660 kilocycles. As soon as they acquire full time on any frequency, it is well known throughout the industry that the Blue network has offered to make the first station in Omaha with full time available to them, a basic station of their network. KMA, Shenandoah, Iowa, now operating with 5,000 watts day and 1,000 watts night, [* forty-five miles air line from Omaha, will soon be operating on 5,000 watts night] which will deliver a signal in Omaha at least two or three times more powerful than the present signal. All of the equipment is installed, engineering measurements and tuning have been made and all that is left is [fol. 895] the final report and approval of the Federal Communications Commission. This will mean that within a period of a few years there will be five acceptable signals in the Omaha area from five full-time regional radio stations and one local which makes the operation of a radio station in Omaha a highly competitive situation.

From the standpoint of further encroachments upon the nighttime coverage of WOW, WKZO, Kalamazoo, Michigan, successfully acquired the right to operate with higher power on the same frequency after several years of litigation. It is not improbable that other stations will attempt to secure the right to use this same frequency because there are only five other stations in the United States of 590 kilocycles. It is generally expected that the radio industry

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[* Words enclosed in brackets erased in copy.]

must utilize new methods of radio transmission such as frequency modulation and television at the end of the war, and most radio stations are [* now considering plans for doing so. A number of stations are] carrying on experimental operations with both frequency modulation and television and most stations are formulating their plans and accumulating funds to install and purchase such equipment.

With these factors in mind, it is my opinion that the future earnings of WOW will be materially decreased and that the past earning record is merely an interesting item but no criterion as to future earnings. The high earning power of WOW during 1942 was during a year of great prosperity in the industry which may not occur again until after the war. In addition, their operating costs indicate frugality in respect to many items which under normal operations would be greater than indicated in their reports. In addition, they have no expenditure for ASCAP license fees which would probably run about $24,000.00 per year and which eventually will be settled in such a manner that they will have to pay license fees. Assuming that WOW would have a gross net income before taxes and before payment of [fol. 896] its lease rental of $200,000.00 to $225,000.00, the net income according to rough computation would be approximately $27,000.00 plus a non-negotiable post-war refund of doubtful value. Taking the post-war refund at its full value, the top earnings after taxes and payment of lease rental would be approximately $40,000.00 per year. In order to meet future needs, WOW must acquire a substantial surplus of several hundred thousand dollars to meet future expansion. This means that within the coming years of expansion WOW should retain all of its earnings as surplus. Consequently, I believe that, based upon these facts and conditions, the lease rental is more than adequate.

The most important factor in determining the market value of a radio station is not net earnings but what the Federal Communications Commission might approve as a sales price. The policy of the Federal Communications Commission has been to refuse approval where a substantial amount of the purchase price represented a payment for good will or license. The most important case in reference to this policy was in 1936 when WOAI, San Antonio, Texas,

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[* Words enclosed in brackets erased in copy.]

with 50,000 watts of power on a clear channel, made application to transfer the radio station and license to the Columbia Broadcasting System at a sale price of $825,000.00 when the appraised value of the tangible property was $140,000.000 and the payment of 'something else' (probably good will) was $684,000.00. Full details are given in Examiner's Report #I-337, Docket #4286, wherein the Examiner refused to permit the transfer because it was against public policy for any one to secure excessive profit for the use of a license or government gratuity. It has been [fol. 897] the general policy of the Federal Communications Commission in numerous occasions thereafter to follow this line of thought which is definitely indicated in the last known transaction involving the sale of several radio stations known as the Yankee Network. I happen to know something about the details of the sale and it is again a matter of public record that the purchase price was $1,240,000.00 for tangible assets having a book value of $1,145,680.00 and that the earnings during 1941 before taxes were $322,990.00 after deducting losses of $120,401.00 in operating frequency modulation transmitters.

It is also a matter of public record that WEEI, Boston, Massachusetts, was transferred with the approval of the Federal Communications Commission on August 31, 1942 at a sale price of $575,000.00 when the rental value for many years has been $255,000.00. The Boston Edison Company had been endeavoring for some period of time to sell the station at a much higher price but soon discovered that this was an impossibility due to the attitude of the Federal Communications Commission and the uncertainty in reference to the renewability of license.

It is again a matter of public record that WMCA, New York, was transferred on November 30, 1940 at a purchase price of $850,000.00 when the tangible assets totaled $583,361.00. All of these stations operate in much greater markets or areas of population and have greater possibilities for expansion in total volume of sales.

[fol. 898] It is a practical impossibility for WOW to increase its total volume of sales because it is nearly sold out all of the time, the extreme difficulty in rasing rates during war time when every effort is made to fix prices of commodities and service, increasing demands of the government for more time for 'war effort' programs diminishing the time available for commercial broadcasting..

The rates of WMCA, New York, WEEI, Boston, and WNAC, Boston, of the Yankee Network are considerably higher than those of WOW, Omaha."

Mr. Stewart: The plaintiff moves to strike the answer for the reason that it appears that it is speculative, and based on rumors and possibilities and uncertainties, and hearsay, and is not the best evidence.

The Court: I think he can for the purpose of what is involved in this case.

Mr. Crossman: Are you going to read the cross interrogatories?

Mr. Stewart: No.

4164 Mr. Massey: All of the defendants offer in evidence the answers to the interrogatories propounded by counsel for the plaintiff. (Reading)

[fol. 899] "Interrogatories for cross-examination.

By Mr. Stewart:

(Mr. Massey reading the questions, and Mr. Crossman reading the answers.)

4165 Q. Are you acquainted with John J. Gillin, Jr., manager of Radio Station WOW, or with De E. Bradshaw, president of Woodmen of the World Life Insurance Society, or any other officials of that company? If so, state fully the nature and length of such acquaintance with each.

A. I have been acquainted with John J. Gillin, Jr. for a period of about twelve years.

4166 Q. Are you a member of any organization, group or committee of parties interested in broadcasting and of which Mr. Gillin is a member? If so, state fully the facts.

A. I am a member of the board of directors of the National Association of Broadcasters of which Mr. Gillin is also a member. We are also managers of stations affiliated with the National Broadcasting Company.

[fol. 900] 4167 Q. Who requested you to testify, and are you testifying because of such request?

A. Mr. Gillin requested me to testify.

4168 Q. Are you receiving any compensation for testifying today? If so, state the facts.

A. No.

4169 Q. Were you told by anyone that the adequacy of the lease rental of Station WOW was involved in litigation? If so, by whom?

A. I read about the litigation in the trade press and newspapers.

4170 Q. Were you told that lessor and lessee of Station WOW were claiming that such rental was adequate? If so, by whom?

A. I concluded from what I had read that this was one of the questions at issue.

4171 Q. Was a lease or sale of Station WOW discussed with you by anyone connected with the station or the Woodmen of the World Life Insurance Society prior to October 3, 1942? If so, state when, where, with whom and the substance of the conversations.

A. No.

4172 Q. Will you state all factors that you considered in forming the opinion that you have given with reference to the adequacy of the lease rental of Station WOW?

A. In my answer to Question 11 in direct examination, I endeavored to give a full explanation of all factors considered in forming my opinion.

[fol. 901] 4173 Q. Did you, in forming your opinion, assume that the lessee would be able to pay the lease rental throughout the period of the lease?

A. No.

4174 Q. If there were some doubt as to the ability of the lessee to pay such lease rental, would it affect your opinion? If so, state how.

A. There are so many provisions in the lease protecting the interests of the lessor that I do not consider it to be an important factor.

4175 Q. In your opinion, is the lessee reasonably sure to make a substantial net profit throughout the period of the lease?

A. No.

4176 Q. What, in your opinion, will be approximately the net profit of the lessee before income taxes?

A. A maximum of $138,000.00 for the year 1943, with a certainty of a declining return during the next four years after which date it is impossible to make any prediction.

4177 Q. What, in your opinion, will be approximately the income tax payable by the lessee on such net profit under the Revenue Act of 1942?

A. It is my opinion that after deducting taxes under the present law, the net profit for 1943 will be approximately

$40,000.00 including the post-war refund on excess profits taxes.

[fol. 902] 4178 Q. If the lessee did not have to pay any income taxes from its net profit, what, in your opinion, would then be a fair lease rental for Station WOW?

A. If the new company did not have to pay any income taxes from its gross net profit, it is my opinion that the lease rental outlined above is still more than adequate compensation.

4179 Q. State, if you know, the reputation and standing of Radio Station WOW and its management up to the present time.

A. The reputation and standing of Station WOW is excellent. And its present management is considered to be among the best in the U. S. A.

4180 Q. State, if you know, whether the operation of Station WOW has been helpful or injurious to the Woodmen of the World Life Insurance Society up to the present time and in what ways.

A. I do not know.

4181 Q. State, if you know, the reputation and standing of Radio Station WOW in Iowa and vicinity up to the present time and whether it has been helpful or injurious to the Woodmen of the World Life Insurance Society and in what ways.

A. The reputation and standing of WOW in Iowa is excellent, but I do not know whether it has been helpful or injurious to the Woodmen of the World Life Insurance Society.

[fol. 903] 4182 Q. In reaching your opinion as to the adequacy of the lease rental of Station WOW, did you consider the lease or sale of any other stations? If so, name such stations.

A. Yes, I did; and answered this question in Question 11, on direct examination, referring to the attempted sale of WOAI, San Antonio, and the actual sales of the Yankee Network, WMCA, New York and WEEI, Boston. I also had in mind the acquisition of KOA, Denver, and KGO, San Francisco, by the National Broadcasting Company, at a reported price of $950,000.00 for both stations.

4183 Q. State, if you know, approximately the sale price or the lease rental of each of such stations and the gross and net income of each of such stations.

A. Those details were given and answered in Question 11, on direct examination.

4184 Q. State, if you know, whether the net income which you have given as to each of such stations was before or after income taxes were deducted and approximately the amount of such income taxes.

A. Those questions were answered in general in previous questions but specifically, the Yankee Network had a gross net income before taxes of $322,990.00 and a net income after taxes of $191,305.00 in 1941.

4185 Q. State whether you have had conversations or communications, either oral or written, with anyone regarding your answers to any of the foregoing interrogatories, either on direct examination or cross-examination. If you have, state when, with whom and the substance of such conversations or communications and attach copies of any written communications received by you.

[fol. 904] A. Some time ago I received a telephone call from Mr. Gillin asking if Mr. Braden, an attorney of the Woodmen of the World Life Insurance Society, could call upon me, which he did. The substance of our conversation was as to whether or not I would be willing to testify in this case. I assume from this conversation that this deposition was arranged."

[fol. 905] Mr. Crossman: Call Mr. Gillin as a witness in behalf of the defendants.

The Court: Of all the defendants?

Mr. Crossman: Well, in behalf of the Woodmen of the World Life Insurance Society and the seven individual officers and directors.

JOHN J. GILLIN, JR. called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Crossman:

4186 Q. Mr. Gillin, you have testified in the case, but I guess not in behalf of the defendants Woodmen of the World Life Insurance Society and the individual officers and directors.

Reference was made in some of the testimony to the rules of the Federal Communications Commission which precipitated the litigation in which the Woodmen of the World Life Insurance Society originally with others was a party, which went to the Supreme Court from a three-judge Court in New York, back to the three-judge Court in New York, and is now on its way back to the Supreme Court. Did you hear that testimony here during the trial?

A. Yes, sir.

4187 Q. And is the instrument which the reporter has marked Exhibit 31, is that a copy of the rules that originated in that litigation?

Mr. Stewart: Objected to as incompetent, irrelevant and immaterial.

[fol. 906] Mr. Crossman: That is pleaded, your Honor, as one of the difficult situations that have developed here.

The Court: This is the opinion?

4188 Mr. Crossman: This is the rules, Exhibit 31, that were promulgated by the Federal Communications Commission that precipitated the litigation which is referred to in the testimony at least of Mr. Bradshaw, and by Mr. Maland also.

A. These are the rules and regulations.

Mr. Stewart: Well, there was no ruling on that objection, was there?

4189 The Court: What is the question?

(Question read.)

The Court: Not a certified copy.

Mr. Crossman: That is right. No.

The Court: That is the question.

4190 Mr. Stewart: Yes; whether he knows it is true or not; is no proper foundation laid for it.

4191 Mr. Crossman: Very well. Then let me offer this statement professionally. When we appeared before your Honor on February 15, 1943 to argue the motion which Mr. Stewart, as plaintiff, directed to the defendants' answer, your Honor held a pre-trial and a record was made of that.

The Court: Not a statutory pre-trial.

Mr. Crossman: Not statutory, but one of your own.

The Court: Yes.

4192 Mr. Crossman: And you asked us specifically at that time—and it is in the record—what rules we referred to, [fol. 907] and we said in that that these were the rules. And on February 15, 1943 we sent an exact copy of Exhibit 31 to Mr. Stewart, and not suspecting that he would object on the ground that it was not certified. We said, "Here it is, and this is what we propose to use" in the letter dated February 15th, in which we said:

"In order, however, that there may be no surprise at the trial as to the other matters referred to in your motions, which the Court overruled, we are further enclosing copies of the following instruments on file with the Federal Communications Commission in connection with this transfer:

(1) Order of the Federal Communications Commission dated December 15, 1942.

(2) Joint petition of the Woodmen of the World Life Insurance Society and Radio Station WOW, Inc. to the Federal Communications Commission to defer the enforcement of the order of December 15, 1942.

(3) Order of Federal Communications Commission of January 12, 1943.

"We also enclose a copy of Order No. 5060 of the Federal Communications Commission promulgated May 2, 1941, composing the rules and regulations of the Federal Communications Commission referred to in the pleadings."

By that, we meant referred to in our answer, and these have been in his possession since that time—all of them.

The Court: Well, we will let it go in.

4193 Mr. Crossman: I should like to read Exhibit 31. [fol. 908] The Court: He has not answered that question.

The Witness: Yes, it is; this is a true copy of the rules and regulations as promulgated by the Commission on May 4, 1941.

4194 Q. Or May 2nd?

A. May 2, 1941.

4195 Q. Referred to in Exhibit 31 as May 2, 1941?

A. May 2, 1941, yes, sir.

4196 Mr. Crossman: We offer in evidence Exhibit 31.

4197 Mr. Massey: Let the record show that on behalf of defendants Radio Station WOW, Inc., and Mr. John J. Gillin, Jr., that I join in the offer of Exhibit 31.

4198 The Court: You say you sent for these?

4199 Mr. Crossman: Yes; these come from the Federal Communications Commission.

4200 The Court: And you sent to the Federal Communications Commission for them?

Mr. Crossman: Yes.

4201 The Court: And you got them through the mail?

Mr. Crossman: Yes, Judge.

The Court: It may be received.

4202 Q. May I inquire of whom the rules, Exhibit 31, were procured?

A. They were procured from Mr. Thomas Slowie, Secretary of the Federal Communications Commission, Washington, D. C.

(Exhibit 31 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 909] EXHIBIT "31"

Before The

Federal Communications Commission

Washington, D. C.

Commission Order in Docket No. 5060

In the Matter of the Investigation of Chain Broadcasting

May 2, 1941

Whereas, the Commission on March 18, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

Whereas, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

Whereas, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

Whereas, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

Whereas, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

Now, Therefore, It Is Hereby Ordered, That the following regulations be and they are hereby adopted:

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substatially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network orgnization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer that one year: *Provided*, That a contract, arrangement, or understading for [fol. 909a] a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization

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[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106. No license shall be granted to a network orgnization, or to any person directly or indirectly controlled by or under common control [2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

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[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

It is Further Ordered, That these regulations shall become effective immediately: *Provided,* That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further,* That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 910] (Mr. Crossman reads Exhibit 31 down to and including Paragraph 3.101.)

4203 Q. Mr. Gillin, would that specified regulation affect WOW?

A. Yes, sir.

(Mr. Crossman read balance of Exhibit 31.)

4204 Q. Would that affect WOW?

A. Yes, sir.

4205 The Court: That would be denying exclusive contract over such territory.

Mr. Crossman: That is right.

The Court: I will consider that, but the hieroglyphics that I don't understand, I won't consider.

4206 Q. Mr. Gillin, Exhibit 32 purports to be—and I will ask you about it—a photostatic copy of an order of December 15, 1942 approving the joint application made by the defendant Woodmen of the World Life Insurance Society as lessor, proposed lessor, and Radio Station WOW, Inc., as proposed lessee, for the transfer of the license, is that correct?

A. Yes, this is a photostatic copy of the consent to assignment of Radio Station construction permit or license from the Woodmen of the World Life Insurance Society to Radio Station WOW, Inc.

4207 Q. Where was Exhibit 32 procured? And from whom?

A. Exhibit 32 was sent by the Federal Communications Commission's secretary to our office by Mr. Thomas Slowie, to the Woodmen of the World Life Insurance Society, and a copy of it was sent to WOW, Inc. That is where it was procured. This is the official notice of the consent for the [fol. 911] operation on the part of the Federal Communications Commission, approving the assignment of WOW as a radio station from the Woodmen of the World Life Insurance Society to WOW, Inc.

4208 Mr. Crossman: May I say also that this is a copy of this instrument which was forwarded by Mr. Wells to Mr. Stewart under date of February 15, 1943 following the hearing we had here in your court that morning, and we now offer in evidence Exhibit 32, and as a part of the offer I should like to say that it is the order that was entered upon the joint application, Exhibit 29, which Mr. Stewart offered without proper foundation, and which has been received.

Mr. Stewart: And which you objected so vigorously, and the Court overruled all objections.

4209 Mr. Massey: Is Exhibit 32 admitted?

The Court: Yes.

4210 Mr. Massey: I want to join in the offer of Exhibit 32 on behalf of Radio Station WOW, Inc. and John J. Gillin, Jr.

4211 Mr. Crossman: May I read it to the Court and pass it back to you?

Mr. Stewart: The plaintiff objects as incompetent, irrelevent and immaterial, and not tending to prove or disprove any issue in this case.

The Court: It may be received.

(Exhibit No. 32 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

(Here follows 1 photolithograph, side folio 912)

Exhibit No. 32

File No. B4-AL-334

[redacted] License No. 686

Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

CONSENT TO ASSIGNMENT OF RADIO STATION CONSTRUCTION PERMIT OR LICENSE

BROADCAST (Class of station) BROADCAST (Nature of service)

To WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY
(Insert assignor if voluntary assignment or assignee if involuntary)

17th & Farnam Streets, Omaha, Nebraska
(Address)

The consent of the Federal Communications Commission is hereby granted to the assignment of [station license] No. B4-B-686, dated 11-6-42 authorizing [operation] of the transmitting apparatus located at No. 56th & Kansas Avenue (Street), Omaha (City or town), Nebraska (State)

from Woodmen of the World Life Insurance Society
(Insert assignor, the present permittee, or licensee)

to RADIO STATION WOW, INC.
(Assignee)

under authority of the Communications Act of 1934.

The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith.

The actual assignment of the [station license], including delivery of said [station license] to the assignee, shall be completed within 30 days from the date hereof; otherwise this consent shall be void and of no effect. Upon completion of the acts necessary to effect the transfer, the assignee shall, by registered letter addressed to the Secretary of the Commission, on Form of Notification No. 726-A (attached hereto), notify the Commission that the necessary undertakings have been completed and the

[fol. 913] 4212 Q. And is Exhibit 32 the order, Mr. Gillin, that permitted Radio Station WOW, Inc. to proceed to broadcast under and by virtue of that license?

A. Yes.

4213 Q. Referring to Exhibit 34, Mr. Gillin, this purports to—and I wish to inquire of you as to whether or not that is a true copy of an order by the Federal Communications Commission on January 12, 1943?

Mr. Stewart: That is objected to as incompetent, irrelevent, immaterial, and calling for a conclusion.

Mr. Crossman: I propose to submit some further foundation.

The Court: Objection overruled.

A. Yes, sir.

4214 Q. And may I ask one other question about the foundation: Where did you procure Exhibit 34?

A. I procured Exhibit 34 from Mr. T. J. Slowie, Secretary of Federal Communications Commission; arrived at WOW on January 15, 1943.

4215 Mr. Crossman: And may I say also that a copy of this Exhibit 34 was sent to Mr. Stewart after the inquiry of your Honor, under our letter of February 15, 1943, and he has had it since then. And so we now offer in evidence Exhibit 34.

The Court: It will be recieved.

4216 Mr. Massey: Let the record show defendant Radio [fol. 914] Station WOW, Inc. and defendant John J. Gillin, Jr. join in said offer.

Mr. Stewart: Let the record show that it is objected to as incompetent, irrelevent, immaterial, no proper and sufficient foundation laid.

The Court: Received.

(Exhibit 34 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 915] EXHIBIT "34"

Cashier Dept. A. Jan. 15, 1943. No Enclosures.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

File No. B4-AL-354

In re Joint Petition of

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

and

RADIO STATION WOW, INC., OMAHA, NEBRASKA

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 12th day of January, 1943;

The Commission having under consideration the joint petition of Woodmen of the World Life Insurance Society and Radio Station WOW, Inc., filed January 5, 1943, for extension of time within which assignment of license may be consumated, and the Commission being fully advised in the premises;

It Is Ordered, That said petition Be, And It Is Hereby, Denied.

Federal Communications Commission (Signed) T. J. Slowie, Secretary. (Seal.)

[fol. 916] 4217 Q. Mr. Gillin, referring to Exhibit 33, is that your signature in behalf of Radio Station WOW, Inc.?

A. Yes, sir.

4218 Q. Is Exhibit 33, if you know, a true copy of the joint petition that was filed by the Woodmen of the World Life Insurance Society as lessor and Radio Station WOW, Inc. as lessee with the Federal Communications Commission?

A. Yes, sir.

4219 Mr. Crossman: This is one of the papers that Mr. Stewart's motion required of us.

4220 The Court: I don't know anything about it. It is not in evidence.

4221 Mr. Crossman: It is not offered yet. I am about to offer it.

4222 The Court: I don't know anything about it until it is offered.

4223 Mr. Crossman: I would like to say that this is one of the transmittals also which Mr. Stewart's motion was directed, and which you overruled his motion on February 15, 1943, for the record, on condition that we supply him with a copy of it, which we did on February 15, 1943.

4224 Mr. Stewart: Well, I know of no rule, from the mere fact that I demand a copy of an instrument of an opposing attorney, permits the receiving of that document in evidence, unless it is otherwise competent.

[fol. 917] 4225 Mr. Crossman: We offer in evidence Exhibit 33.

Mr. Stewart: To which the plaintiff objects as incompetent, irrelevant, immaterial, and not tending to prove or disprove any issue in this case, and needlessly encumbering the record.

4226 Mr. Massey: I wish to join in the offer of Exhibit 33 on behalf of the defendants Radio Station WOW, Inc. and John J. Gillin, Jr.

4227 Mr. Stewart: Are you going to take out parts of the exhibit?

4228 Mr. Crossman: I would be glad to, if you are willing.

The Court: It may be received. This is an illustration of how fine a pre-trial works.

4229 Mr. Crossman: Exactly. We did this whole thing here in the court room, and there is a record of it.

4230 Mr. Stewart: We asked that this be attached to their answer, and the Court overruled it.

4231 Mr. Crossman: On condition that we supply you with a copy of it, which we did.

4232 Mr. Stewart: Even though you did, that doesn't make it admissible in itself, does it?

4233 Mr. Crossman: You wanted it attached to our answer, and we said no, but we would give you a copy.

Now, let me see if I can continue with this. I would like to ask leave to withdraw from Exhibit 33 the copy of the

[fol. 918] petition in this case, which won't add anything to it.

4234 Mr. Stewart: Well, you can certainly withdraw it. That was one of the bases of my objection; it is needlessly encumbering the record to now put in a copy of the petition.

4235 Mr. Crossman: I would also like to withdraw from Exhibit 33 a copy of the motion that we made to your petition.

4236 The Court: What is the purpose of withdrawing it?

4237 Mr. Crossman: Because they are pleadings in this case.

4238 The Court: You can offer it in evidence now.

4239 Mr. Crossman: No. I am going to take those pleadings out.

4240 The Court: I don't think you should take the pleadings out, take them out of the proper place.

4241 Mr. Massey: The petition on which this suit is being tried is in the exhibit, in this joint application which was sent back to Washington.

4242 The Court: A copy of it?

4243 Mr. Massey: A copy of it, and it encumbers the record.

4244 The Court: Identify it as such and offer it in evidence.

4245 Mr. Crossman: Let's not take anything out. I withdraw all these applications to take out a part of Exhibit 33, and I would like to state briefly to the Court what Exhibit 33 is.

The Court: Received.

Exhibit 33 received in evidence, same being made a part of this Bill of Exceptions, and being attached hereto as follows:

[fol. 920] EXHIBIT "33"

Before the

Federal Communications Commission

Washington, D. C.

File B4-AL-354

In Re Application of Woodmen of the World Life Insurance Society

and

Radio Station WOW, Inc., for Consent to Voluntary Assignment of License of Radio Station WOW, Omaha, Nebraska

Joint Petition of Woodmen of the World Life Insurance Society and Radio Station WOW, Inc.

1. Petitioner, Woodmen of the World Life Insurance Society is a Fraternal Benefit Society incorporated under and by virtue of the laws of the State of Nebraska, with its home office and principal place of business at Omaha, Douglas County, Nebraska; it is the sole owner and operator of Radio Station WOW, and has so owned and operated said broadcast station under a license permit from your Commission and your predecessor continuously since 1923.

2. Petitioner, Radio Station WOW, Inc., is a corporation organized under the laws of the State of Nebraska on October 3, 1942, for the primary purpose of engaging in the business of radio broadcasting.

3. Petitioners entered into a contract of lease of radio station WOW, subject to the approval of the Federal Communications Commission. An application in due form and in compliance with the Rules and Regulations of the Commission was filed under date of October 9, 1942, requesting the Commission's written consent to the voluntary assignment of license of radio station WOW.

4. Petitioners show that on November 23, 1942, there was filed a petition in equity in the District Court of Douglas County, Nebraska, by Homer H. Johnson, plaintiff, vs.

Radio Station WOW, Inc., Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, [fol. 921] R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., defendants; that summons was issued thereon returnable on the 7th day of December, 1942, and served on each of the defendants the 23rd day of November, 1942, commanding each of them to answer on or before the 28th day of December, 1942. A copy of said petition in equity is attached hereto and made a part hereof, marked Exhibit "A". In said action the plaintiff on behalf of himself, and all other members of the Woodmen of the World Life Insurance Society, complained and alleged that the consideration for said contract of lease was grossly inadequate, unfair and inequitable, and especially to the members of the Woodmen of the World Life Insurance Society, and was in violation of the duties of the defendant officers of the Society and the trust reposed in them as such officers, and prayed to have the parties defendant in said action enjoined from entering into said lease contract and from transferring by lease assignment, or otherwise, radio station WOW, or its license thereto and to have annuled and declared invalid said lease on the grounds and for the reasons therein stated; that defendant officers of the Society be ordered to pay to the Society all costs and expenses incurred in connection with the aforesaid lease and assignment, and for such other further and different relief as equity and justice may require.

5. Petitioners and all other co-defendants are making defense to the action described in paragraph 4 above by proper pleadings and proof; that motions to strike and make more definite and certain were filed on the 28th day of December, 1942, copies of which are attached hereto and made a part hereof marked Exhibits "B" and "C", respectively, and that answers will be filed in due course making issue with every material allegation of the petition.

6. Your petitioners further state that they are informed and believe that after due consideration the Commission [fol. 922] on the 15th day of December 1942 entered an order consenting to the lease contract and granted authority to make assignment of the license to operate radio station

WOW to Radio Station WOW, Inc., for the operation of said station under said lease contract; that in entering into said contract, it was their belief and opinion that the consideration for said lease contract was adequate, fair and equitable as between the parties, and including the members of the Woodmen of the World Life Insurance Society; that said lease contract was entered into and application made to this Commission for approval thereof and authority to make assignment of the license to operate radio station WOW in good faith; that the action instituted in the District Court of Douglas County, Nebraska, was filed without the knowledge or consent of and against the wishes and desires of your petitioner; that formal request for the transfer of the broadcasting facilities and license has been made by Radio Station WOW, Incorporated, and declined by the Woodmen of the World Life Insurance Society because of the pendency of the action in the District Court above referred to; that until the final adjudication in the action of the District Court of Douglas County, Nebraska, has been made, it is the opinion and judgment of your petitioners that they should not make a transfer of the radio broadcast facilities and assignment of the license to operate station WOW; that before said transfer and assignment be made the rights of the parties should be fully adjudged in said action.

Wherefore, your petitioners pray for an order of the Commission extending the time within which their contract may be consummated and postponing the date upon which form 726-A must be returned to the Commission until final adjudication of the action pending in the District Court of [fols. 923-935] Douglas County, Nebraska, and for such other and further relief as may be proper.

Respectfully submitted, Woodmen of the World Life Insurance Society, by Rainey T. Wells, General Attorney. Radio Station WOW, Inc., by John J. Gillin, Jr., President.

[fol. 936] EXHIBIT "B" TO EXHIBIT "33"

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 370. No. 111. Ct. 8

HOMER H. JOHNSON, Plaintiff,

vs.

RADIO STATION WOW, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, a Corporation; De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., Defendants

MOTION TO MAKE MORE DEFINITE AND CERTAIN AND TO STRIKE CERTAIN ALLEGATIONS FROM THE PETITION

Come now the defendants, Woodmen of the World Life Insurance Society, a corporation; De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, on behalf of themselves and each of them and file this Motion and move the Court to require the plaintiff to strike certain language and allegations from his petition for the reason that said language and allegations are conclusions of the pleader, argumentative, redundant, immaterial, irrelevant and neither seek to prove or disprove any material allegations in said petition contained, as follows:

1

The last sentence of paragraph 4 of the petition, reading as follows: "The defendant officers have at all times hereinafter mentioned and do now dominate and control the management and affairs of the Society."

2

Paragraph 9 of the petition, reading as follows: "Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants, in violation of their duties as officers of the Society and the trust reposed [fol. 937] in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of radio station WOW

for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose, the individual defendants did and caused to be done the following acts:".

3

The last clause of paragraph 9, subparagraph (e) of the petition, reading as follows: "and objections to the granting of consent to the aforesaid assignment of the radio station without a public hearing have been made by Hon. Dan Butler, mayor of the City of Omaha, Nebraska, for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska."

4

The last two sentences of paragraph 11 of the petition, reading as follows: "If for any reason the earnings of the station should decline a point where the payment of the rental named in the lease would be unprofitable for defendant Radio Station WOW, Inc., it can then cause the lease to be terminated and the station returned to the Society for operation with its earnings thus reduced. The lease is aptly described by paraphrasing a familiar saying to 'heads Radio Station WOW, Inc. wins, tails the Society loses'."

5

Paragraph 12, subparagraphs 2, b, c, d, e and f of the petition, reading as follows: "Defendant Bradshaw's son-in-law, John B. Dawson, is a lawyer residing in New York City with his office at 48 Wall Street. He has been handling legal matters for the companies engaged in the sale of bonds issued by the Consumers' Public Power District in connection with its acquisition of power facilities, and is ex- [fol. 938] pected to render similar services if such power facilities in Omaha are acquired by Consumers' Public Power District. The companies engaged in the sale of such bonds will receive a large amount for their services in selling such bonds. The amount is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00. Defendant Bradshaw has strongly urged the aforesaid sale of such power facilities, and he, together with other officers of the Society, recently resigned from the Omaha Chamber of Commerce because they disapproved its opposition to such sale.

"(b) Defendant Gillin is president, director and the largest stockholder of defendant Radio Station WOW, Inc., and he is to become the manager of the station for that company. He has for many years been the manager of radio station WOW for the Society and a protege and close associate of defendant Bradshaw.

"(c) Guy C. Myers, Vice President, director and second largest stockholder of defendant Radio Station WOW, Inc. resides near New York City, with his office at 35 Wall Street, New York City. He is now and has been for the past several years engaged in promoting the sale of various power facilities to Consumers' Public Power District, including those now owned and operated by Nebraska Power Company at Omaha, Nebraska. Myers receives as compensation for such services a contingent fee in the form of a commission based on the purchase price of the facilities acquired. The amount of such commission, in the event he makes a sale of the Omaha facilities, is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00.

"(d) Francis P. Matthews, Vice President, director and large stockholder of defendant Radio Station WOW, Inc., [fol. 939] resides in Omaha where he is now and has been for many years engaged in the practice of law and is attorney for Consumers' Public Power District.

"(e) M. M. Meyers, Secretary, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is engaged in the business of buying and selling bonds and he is to participate in the sale of bonds issued by the Consumers' Public Power District in the event it acquires the facilities of the Nebraska Power Company in Omaha, Nebraska.

"(f) Harvey E. Milliken, Treasurer, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is engaged in the printing business. The printing company with which he is associated has for many years done a large volume of printing for the Society. He has for many years been a close personal friend of defendant Bradshaw and has favored and urged the sale of the aforesaid power facilities to Consumers' Public Power District.

"Other persons whose names are unknown to plaintiff are interested in defendant Radio Station WOW, Inc. and in its operation of station WOW and in the benefits and profits therefrom. The obvious purpose of the leasing of the station as aforesaid is to make the radio station available to the Consumers' Public Power District and those interested in its acquiring such power facilities for spreading propaganda favoring such sale. The sale of such power facilities affects only a small part of the membership of the Society and the use of the station to sponsor such sale is contrary to the objects and purposes of the Society and to the best interests of the Society and its members and to the listeners of the station and to the public generally."

6

Paragraph 13 (erroneously numbered 11) of the petition, reading as follows: "Defendant officers of the Society did [fol. 940] not, prior to the execution of the aforesaid lease, disclose to the Society's members the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single asset of the Society for a grossly inadequate consideration and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to the Consumers' Public Power District as aforesaid."

Come now the defendants, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, on behalf of themselves and each of them and file this motion and move the Court that if plaintiff be not required to strike the language and allegations of his petition as set out in paragraphs 1 and 2 above, that plaintiff be required to make said language and allegations more definite and certain, for the reason that said language and allegations are conclusions of the pleader, indefinite and uncertain in their meaning and intent, as follows:

A

The last sentence of paragraph 4 of the petition, reading as follows: "The defendant officers have at all times hereinafter mentioned and do now dominate and control the man-

BROADCAST (Class of station) BROADCAST (Nature of service)

To WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY
(Insert assignor if voluntary assignment or assignee if involuntary)

17th & Farnam Streets, Omaha, Nebraska
(Address)

The consent of the Federal Communications Commission is hereby granted to the assignment of {construction permit / station license} No. B4-S-686, dated 11-6-42 authorizing {construction / operation} of the transmitting apparatus located at No. 56th & Kansas Avenue (Street), Omaha (City or town), Nebraska (State)

from Woodmen of the World Life Insurance Society
(Insert assignor, the present permittee, or licensee)

to RADIO STATION WOW, INC.
(Assignee)

under authority of the Communications Act of 1934.

The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith.

The actual assignment of the {construction permit / station license}, including delivery of said {construction permit / station license} to the assignee, shall be completed within 30 days from the date hereof; otherwise this consent shall be void and of no effect. Upon completion of the acts necessary to effect the transfer, the assignee shall, by registered letter addressed to the Secretary of the Commission, on Form of Notification No. 726–A (attached hereto), notify the Commission that the necessary undertakings have been completed and the {construction permit / station license} transferred. Upon the depositing in a United States Post Office of Form of Notification No. 726–A, duly executed, the assignee is authorized to begin the {construction / operation} of the station in accordance with all the terms and conditions of said {construction permit / station license}. This consent shall not authorize the {construction / operation} of said station by the assignee unless and until such notification is deposited in a United States Post Office

It is hereby directed that this consent, when effective, be attached to the above-described {construction permit / station license}, posted as required by Section 2.51 of the Rules and Regulations.

Dated this 15th day of December, 1942

BY DIRECTION OF THE FEDERAL COMMUNICATIONS COMMISSION.

T J Slowie
Secretary.

[SEAL]

mfh

16—2554 U. S. GOVERNMENT PRINTING OFFICE

agement and affairs of the Society", and to plead definitely and with particularity the manner, method and means by which said officers dominate and control the management and affairs of the Society.

B

The allegation of paragraph 9 of the petition, reading [fol. 941] as follows: "* * * devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of radio Station WOW for a grossly inadequate consideration * * *", and to definitely, specifically and with particularity allege the manner, means and method by which said officers could or would procure for the benefit and profit of themselves and associates the possession and control of Radio Station WOW.

Respectfully submitted, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, by —— ——, Attorney for said Defendants.

[fol. 942] EXHIBIT "C" TO EXHIBIT 33

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Doc. 370. No. 111. Ct. 8

HOMER H. JOHNSON, Plaintiff,

vs.

RADIO STATION WOW, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, a Corporation; De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Stanley C. Holston and John J. Gillin, Jr., Defendants

MOTION

Come now the defendants, Radio Station WOW, Inc., and John J. Gillin, Jr., and each separately move the Court for an order striking from the petition the following mentioned parts:

I

The last sentence of Paragraph Nine (9) appearing on page Seven (7), beginning with the words "Said application is now" and ending with the word "Nebraska" for the reason that the statements therein contained are argumentative, are irrelevant, immaterial and incompetent, and constitute a conclusion of the pleader and for the further reason that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission.

II

All of Paragraph Twelve (12) and each sub-paragraph thereof for the reason that the allegations therein contained are incompetent, irrelevant and immaterial; constitute conclusions of the pleader and neither seek to prove nor disprove, add to or detract from, any material allegation in said petition contained.

Radio Station WOW, Inc., John J. Gillin, Jr., By —— ——, Their Attorney.

[fol. 943] Mr. Wells: The defendants are not resting, but we are stepping aside for Mr. Massey.

Witness excused.

Robert D. Samardick called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Massey:

4246 Q. Please state your name, address and occupation.

A. Robert D. Samardick, 1214 South 61st Street, Omaha, Nebraska, vice-president of Danbaum & Company.

4247 Q. Mr. Samardick, are you acquainted with De E. Bradshaw?

A. Yes, sir.

4248 Q. How long have you known him?

A. About twelve, fifteen years.

4249 Q. What has been the nature of your acquaintance?

A. I have known him, met him and been with him at various doings, at Ak-Sar-Ben and Chamber of Commerce and various other organizations.

[fol. 944] 4250 Q. Do you have any business connection with him?

A. Yes, sir.

4251 Q. Do you know Mr. Patterson?

A. Yes, sir.

4252 Q. What is the nature of that acquaintance?

A. The same.

4253 Q. Do you know Mr. Newberry?

A. Yes, sir.

4254 Q. And what is the nature of that acquaintanceship?

A. The same.

4255 Q. How about William Ruess?

A. In the same manner, only I have known Mr. Ruess for two or three years, I believe.

4256 Q. Do you know Mr. Braden?

A. Yes.

4257 Q. What is the nature of that acquaintance?

A. The same acquaintance; that is, for the last couple or three years.

4258 Q. Do you know Mr. R. E. Miller?

A. Yes, sir.

4259 Q. Do you know Mr. Sterling C. Holston?

A. No, sir.

4260 Q. Are you a stockholder in Radio Station WOW, Inc.?

A. Yes, sir.

4261 Q. How many shares of the common and preferred stock of that corporation do you own?

[fol. 945] A. Fifty shares of each.

4262 Q. What did you pay for each class of stock?

A. Preferred, I paid, I think, $99.00 apiece, and the other $1.00 apiece.

4263 Q. Did you pay for that in cash?

A. I paid by check.

4264 Q. Whose check?

A. My check.

4265 Q. You didn't borrow the money?

A. No, sir.

4266 Q. Where are your certificates now?

A. Down in my office.

5267 Q. Who owns them?

A. I do.

4268 Q. Does any other person have any interest in those certificates for the stock?

A. No, sir.

4269 Q. The plaintiff alleges in his petition that this lease was a scheme or a plan whereby the officers of the Woodmen of the World Life Insurance Society, whose names I have mentioned, will in some way participate in the profits of this station. I will ask you whether there is any truth to that allegation so far as you are concerned?

A. No, sir.

4270 Q. Does any person have any interest whatever in your stock?

A. No, sir.

[fol. 946] 4271 Q. Does any person have any interest in any income that might accrue to you from such ownership?

A. No.

4272 Q. To your knowledge, is there any understanding or agreement, be they written or oral, whether it is effective now or whether it will become effective in the future, whereby any person other than yourself shall in any way acquire any interest in your stock?

A. No, sir.

4273 Q. Either now or in the future?

A. None whatsoever.

4274 Q. Or any interest now or in the future to any benefits that might accrue through that stock?

A. No, sir.

4275 Q. Do you know whether there is any arrangement whereby the relatives of any of the officers of the Woodmen of the World Life Insurance Society, that I have named, shall participate in your stock in any way?

A. No, sir.

4276 Q. No relative of any of the officers?

A. No, sir.

4277 Q. Do you know whether any of your associates in this lessee corporation are relatives to any of the officers of the Society?

A. Not that I know of.

4278 Q. Now, Paragraph 13 of the petition alleges that Radio Station WOW, Inc. is dominated and controlled by the officers of the Woodmen of the World Life Insurance Society

and by persons interested in seeing that the Consumers Public Power District shall acquire Radio Station WOW. Is there any truth in that statement?

A. No, sir.

[fol. 947] 4279 Q. Who does dominate and control Radio Station WOW, Inc.?

A. The stockholders and directors.

4280 Q. Have any of the officers or directors of the Woodmen of the World Life Insurance Society ever suggested such a plan?

A. No, sir.

4281 Q. Why did you buy the stock in Radio Station WOW, Inc.?

A. Well, because I believe it is a good investment, good deal.

4282 Q. The plaintiff claims that the men interested in Radio Station WOW, Inc. are interested in the Consumers Public Power District acquiring the property of the Nebraska Power Company here in Nebraska. I will ask you whether you are in favor of such action?

A. I am not. I am against it.

4283 Q. Have you ever been directly or indirectly connected with the Consumers Public Power District?

A. No, except that we do get some business, my firm gets some business from the Loup River power plant.

4284 Q. What kind of business?

A. We guard their property.

4285 Q. By reason of that business were you prompted to go into this business with Mr. Gillin?

A. No.

4286 Q. Do you know whether a part of the radio time is to be used to spread propaganda promoting the acquisition of power facilities here by the Consumers?

A. No, sir.

[fol. 948] Cross-examination.

By Mr. Stewart:

4287 Q. You say you got into the new company through Isaacson, didn't you?

A. That is right.

4288 Q. You didn't have any talk with Gillin or Bradshaw about it?

A. No, sir.

4289 Q. Have you had any business transactions with the Society?

A. No, except that we furnished them armored car service, hauling their money to the bank.

Witness excused.

[fol. 949] H. E. MILLIKEN, called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Massey:

4290 Q. Will you state your name and address, please?

A. H. E. Milliken, 126 South 54th Street, Omaha.

4291 Q. What is your business, Mr. Milliken?

A. Printing and lithographing.

4292 Q. What companies?

A. Omaha Printing Company and the Beacon Press.

4293 Q. How long have you been associated with the Omaha Printing Company?

A. Since 1927; sixteen years.

4294 Q. Prior to that time, whom were you connected with?

A. Fifteen years with the K-B Printing Company.

4295 Q. Do you know De Emmett Bradshaw?

A. Yes, sir.

4296 Q. What is the nature of that acquaintanceship?

A. Business and social.

4297 Q. Do you know Mr. T. E. Patterson?

A. Yes, sir.

4298 Q. What is the nature of that acquaintanceship?

A. The same.

4299 Q. Farrar Newberry?

A. Yes, sir.

4300 Q. And the nature of that acquaintanceship?

[fol. 950] A. The same.

4301 Q. Mr. William Ruess?

A. Yes, sir.

4302 Q. And your answer is the same?

A. Yes.

4303 Q. How about W. C. Braden?

A. The same.

4304 Q. Mr. R. E. Miller?

A. Yes, sir; the same.

4305 Q. Sterling C. Holston?

A. The same.

4306 Q. What is the nature of your business connection with the men that I have named?

A. Our firms have daily business transactions with them; we have a contract, we print their blanks, we print the Woodmen magazine, we equipped their vault with steel fixtures, furnished a lot of the furniture on the fourth floor, and almost daily transactions of business.

4307 Q. The furniture on the fourth floor, was that office furniture?

A. Office furniture.

4308 Q. Now, this printing that you speak of, is that printing let on a competitive basis?

A. Yes, sir.

4309 Q. Is there a notice to all printing institutions for bids, or how is that handled?

A. Too much notice, yes, sir. It is handled by request- [fol. 951] ing bids and publishing the magazine with a circulation of about 350,000 copies all over the United States to please come in and give us some prices on printing and publishing the magazine.

4310 Q. When the bids are opened, do you know how many bids are opened?

A. I cannot give that. They won't let me sit in the meetings, but there have been plenty of bids in.

4311 Q. Is there any other business connection that you have with any of the officers of the Woodmen of the World Life Insurance Society that I have named?

A. No, sir.

4312 Q. Mr. Milliken, how many shares of common and preferred stock do you own in the radio station?

A. Fifty of each.

4313 Q. What did you pay for each class?

A. $99.00 a share and $1.00 a share.

4314 Q. $99.00 a share for the preferred stock, and did you give them a check?

A. A cashier's check for $5,000, and I received fifty shares of common stock and fifty shares of preferred stock.

4315 Q. Did any of the officers of the Society that I have named help you to get that cashier's check in any way?

A. They did not.

4316 Q. Where are your stock certificates now?

A. In the safety deposit vault at the Omaha Safety Deposit Company.

4317 Q. Is that your stock?

[fol. 952] A. Yes, sir.

4318 Q. Who else, if anyone, has any interest in it?

A. No one has any interest in that stock.

4319 Q. Mr. Milliken, I will call your attention to the allegation of the plaintiff's petition, Paragraph 9, wherein Dr. Johnson, the plaintiff in this suit, alleges as follows: "Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants"—meaning Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston—"in violation of their duties as officers of the Society, and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of Station WOW for a grossly inadequate consideration." I will — you whether you are one of the friends referred to in that allegation?

A. I don't understand that, Mr. Massey. Won't you state that again, please?

4320 Q. Let me give you the substance of it. The plaintiff claims that the individuals named, officers of the Woodmen of the World Life Insurance Society, devised a plan or scheme whereby they could get this radio station for their own benefit, the benefit of their friends, the benefit of their associates. I want to know if you fall within the category of their friends or their associates.

A. I think I am both. I do business with them, and every [fol. 953] one of them, because they are all friends of mine.

4321 Q. I mean in connection with any interest.

A. Whether they have any interest in my stock or not?

4322 Q. Or whether you are an associate with them in the plan whereby they can get possession of this station for their benefit?

A. That is ridiculous, Mr. Massey. This stock was sold to me, and it is my stock, and there aren't any Woodmen officers or any of their kin folks or associates have any interest in these fifty shares of stock in the name of Harvey E. Milliken. Does that answer your question?

4323 Q. That is right. There is no present interest, you say?

A. No what?

4324 Q. Present interest, is there?

A. There is no interest or understanding of any kind whatsoever. Make it as broad as you want to.

4325 Q. Either now or in the future?

A. No.

4326 Q. Are you related to any of the officers that I have named?

A. No, sir.

4327 Q. Do you know whether or not any of your associates in Radio Station WOW, Inc. are related to any of them?

A. Not to my knowledge.

4328 Q. In Paragraph 13 of the petition Dr. Johnson alleges that Radio Station WOW, Inc. is dominated and controlled by the officers of the Society whom I have named. Is that true?

A. No, sir.

[fol. 954] 4329 Q. Who does dominate and control the management of Radio Station WOW, Inc.?

A. It is controlled by the Board of Directors led by Johnny Gillin, Jr.

4330 Q. Does any person other than a director or any officer or stockholder have anything to say about its management now?

A. Nothing.

4331 Q. Has any officer of the Society suggested that they have something to say about the matter?

A. There has been no attempt to do anything of the kind.

4332 Q. Well, if you were approached with the proposition that they tell you how to run this station, what would you do?

A. I am afraid I could not answer the question strong enough, by my investment in Radio Station WOW, I made my bet on Johnny J. Gillin, Jr., and I have every faith in Johnny Gillin's judgment, and whatever Johnny would say to do with that, I would have gone with him, either give it to the Woodmen of the World or the Consumers, if he had said so, I would do it. I put my bet on Johnny Gillin, and

I would not have had anything to do with it if Johnny Gillin was not in it.

4333 Q. Would you have any interest in going into this company if you had no printing contracts with the Society?

A. The printing has nothing whatever to do with my going in. This is not printing company money. It is my $5,000 personally. This is not the investment of the printing company. This is my money that was used, and it is my stock.

[fol. 955] 4334 Q. Well, then might I assume that even though you had no printing company you would have still gone into this new company?

A. Exactly.

4335 Q. It is further claimed that the men in this company are interested in seeing the Consumers Public Power District acquire the facilities of the Nebraska Power.

A. That is likewise ridiculous.

4336 Q. Well, what is your plan on that issue? Do you favor it?

A. You want to smoke me out whether I am for the sale of the power company to the Consumers or not?

4337 Q. If I don't, Mr. Stewart will.

A. I am opposed to it.

4338 Q. I believe I have asked you why you invested in this stock. Let me ask you why you did?

A. I hoped to make a profit out of it.

Cross-examination.

By Mr. Crossman:

4339 Q. Mr. Milliken, I don't want you to leave the stand without getting your official capacity with the Omaha Printing Company.

A. I am the president of the Omaha Printing Company, and general manager.

4340 Q. And do you occupy a similar position with the Beacon Press?

A. Yes, sir. That is all one corporation, Mr. Crossman, the Omaha Printing Company and the Beacon Press. The Beacon Press is a subsidiary of the Omaha Printing Company. We are responsible for them in every way.

[fol. 956] Cross-examination.

By Mr. Stewart:

4341 Q. Who first suggested to you, Mr. Milliken, that you buy stock in this new company?

A. Mr. De E. Bradshaw.

4342 Q. About when was that?

A. I presume it was in late July or August of 1942.

4343 Q. Did you talk with anybody about participating in the company between that time and the day that the incorporators held their meeting?

A. I think not. I discussed it with Johnny Gillin that forenoon on the telephone, but I think in the meantime I recall no conversation with anybody.

4344 Q. Are you what might be called a close personal friend of these officers of the Society that Mr. Massey inquired about?

A. Yes, sir; they are amongst my closest friends.

4345 Q. And you are one of the men who now has control of the radio station?

A. I am one of the stockholders in Radio Station WOW, Inc., yes, sir.

4346 Q. And you are one of the directors?

A. Yes, sir.

4347 Q. And you are one of the officers?

A. Yes, sir.

[fol. 957] 4348 Q. The Society is one of your largest customers, isn't it?

A. Yes, sir.

4349 Q. Is it the largest?

A. It is either the largest or pretty close. It is a toss-up between the Woodmen and the Union Pacific Railroad Company.

4350 Q. Did you borrow the money to invest in this stock?

A. Yes, sir.

Redirect examination.

By Mr. Massey:

4351 Q. Mr. Milliken, had you not known any of the officers of the Woodmen of the World Life Insurance Society would you still have invested in this company under Mr. Gillin?

A. Yes, sir.

Recross examination.

By Mr. Crossman:

4352 Q. I have a question on this—I don't want any open ends in your testimony: Did you borrow the money to invest in this stock from any of these seven individual directors and officers that have been sued here?

A. No, sir. I borrowed the money to invest in this stock from the U. S. National Bank.

4353 Q. And is that your regular and ordinary banking connections?

A. No.

4354 Q. Which one is it?

[fol. 958] A. I will answer the question, but it has not a thing in the world to do with this case.

4355 Q. I think that is right.

A. But my regular bank connection is the Omaha National Bank. Mr. H. M. Bushnell, president of the U. S. National Bank is the president of the trust company where Mr. Frank B. Johnson's will is administered, where Mother Johnson's trust rests, and is on the board of directors of the Omaha Printing Company, and before I embark on any venture that would take my time or the use of my name with any other corporation I naturally would approach Mr. Bushnell and get his reaction, and I did that on October 3rd, during the noon recess, and found out how Mr. Bushnell was going to react about my going into this venture, and Mr. Bushnell said, "Where will you get your money?" I said, "I will go up to Dale Clark." And he says, "You are going to borrow the money from us." And I borrowed it there.

4356 Q. Did any of these individual directors or officers pledge their personal credit or any collateral that you know of in behalf of your loan?

A. No, sir.

Recross-examination.

By Mr. Stewart:

4357 Q. This date, October 3, 1942, that you mentioned, that was the day that the incorporators had their first meeting, is it?

A. That is my recollection, Mr. Stewart. I don't want to

[fol. 959] be checked without having the record, but I think it was October 3rd, was the incorporators meeting.

4358 Q. And that was the date that the lease was signed?

A. I think it was cleaned up that afternoon, yes, sir.

(Witness excused.)

M. M. MEYERS having been heretofore called and duly sworn, recalled as a witness on behalf of the defendants, and testified further as follows:

Direct examination.

By Mr. Massey:

4359 Q. Will you please state your name and address and business?

A. M. M. Meyers, 675 North 57th Avenue, investment broker.

4360 Q. Any other business besides that of an investment broker?

A. Why, I am secretary of the Western Limestone Products Company; I am secretary of the WOW, Inc.

4361 Q. Are you any relation to Guy C. Myers?

A. I am not.

4362 Q. You spell your name M-e-y-e-r-s, is that right?

A. That is correct.

[fol. 4363] Q. And Guy Myers spells it M-y-e-r-s?

A. That is right.

4364 Q. There are seven defendants in this case who are officers of the Woodmen of the World Life Insurance Society; I shall name them: Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston. Are you acquainted with all of those men?

A. I am.

4365 Q. What is the nature of that acquaintance, whether social or business?

A. Well, I have got to divide that up a little bit. Mr. Bradshaw and—(interrupted).

4366 Q. Take Mr. Bradshaw.

A. That has been social and business.

4367 Q. What is the nature of the business connection?

A. Selling the Woodmen of the World Life Insurance Society bonds.

4368 Q. Do you sell them many securities?

A. Well, not as many as I would like to.

4369 Q. Are they one of your larger ones—one of your larger accounts?

A. Yes, it is one of my larger accounts. I sold them $251,000 last year.

4370 Q. Last year?

A. That is right.

4371 Q. Have you sold them anything this year?

A. I believe not, no.

[fol. 961] 4372 Q. What is the nature of your acquaintance with Mr. Patterson?

A. I know him socially and in a business way; the same way I know Mr. Bradshaw.

4373 Q. Does he sit in and pass on the question of whether they will purchase your securities?

A. He does.

4374 Q. Who else sits in on such conferences?

A. Mr. Ruess, Mr. Braden and Mr. Newberry.

4375 Q. What is the nature of your connection with Mr. Miller and Mr. Holston?

A. Social and business.

4376 Q. What is the nature of the business transactions?

A. Selling bonds.

4377 Q. How long have you sold bonds to the Woodmen of the World Life Insurance Society?

A. Oh, I believe it dates back about ten years.

4378 Q. Do you know roughly how many bonds in dollars and cents the Society purchases annually?

A. No. It would only be a lump sum, but I understand it is anywhere from twenty-five to thirty million. It varies.

4379 Q. How many in dollar volume—what did you sell them last year?

A. $251,000.

4380 Q. You are a stockholder in Radio Station WOW, Inc., are you not?

A. I am.

4381 Q. Tell us the number of shares of preferred and common that you own.

[fol. 962] A. I own fifty shares of preferred and fifty shares of common.

4382 Q. What did they cost you?

A. I paid $99.00 a share for the preferred, and $1.00 a share for the common.

4383 Q. How did you pay for that stock?

A. I borrowed $3,000 at the Omaha National Bank. The rest was cash I had in my bank account.

4384 Q. Was that $3,000 loan secured?

A. It was.

4385 Q. State how it was secured. How did you secure it?

A. Life insurance policies.

4386 Q. On your life?

A. On my life.

4387 Q. Any other collateral?

A. And 541 shares of Western Limestone Products common stock.

4388 Q. Whose signature appears on the note?

A. My signature.

4389 Any other signature?

A. My wife's signature.

4390 Q. Any other signature?

A. No, sir.

4391 Q. All right. Where are your stock certificates now?

A. In my possession, in my office.

4392 Q. Who besides yourself has any interest in the stock?

A. No one.

4393 Q. The plaintiff claims that this leasing of the station was part of a plan whereby the officers of the Woodmen of the World Life Insurance Society that I have named will acquire possession of the radio station for their own [fol. 963] personal profit and benefit. I will ask you whether any of the officers that I have named, or any of their relations, or anybody through them, has any interest in your stock?

A. They do not.

4394 Q. Is there any agreement or understanding, either written or oral, or effective now or to become effective in the future, on the happening of some contingency whereby any of these officers, or any of their relatives or any of their friends, or anyone associated with them, shall in any way acquire any interest in your stock?

A. No, sir.

4395 Q. Will they acquire any interest in the stock that might accrue from such ownership?

A. No, sir.

4396 Q. Now, Dr. Johnson, in Paragraph 13 of his petition, alleges that Radio Station WOW, Inc. is dominated and controlled by the officers that I have named. Is that a fact?

A. Not to my knowledge.

4397 Q. That is, to the officers of the Woodmen of the World Life Insurance Society?

A. Yes.

4398 Q. Do you have any knowledge whether any of the officers of the Society dominate you or any of your actions in connection with your duties either as a stockholder or director or an officer of Radio Station WOW, Inc.?

A. They do not.

4399 Q. At any of the meetings that you have attended have any of the officers or directors of the Woodmen of [fol. 964] the World Life Insurance Society ever appeared and suggested that you take any action or not take any action?

A. They have not.

4400 Q. Have you attended all of the meetings of Radio Station WOW, Inc. held since its inception or incorporation?

A. All but one, I believe.

4401 Q. Well, did any of the officers at any meeting that you attended suggest that you do or do not do certain things?

A. No.

4402 Q. Well, who does dominate and control WOW, Inc.?

A. The Board of Directors and stockholders.

4403 Q. Do you know whether or not any of the stockholders, officers or directors of Radio Station WOW, Inc. are related to any of the officers of the Woodmen of the World Life Insurance Society?

A. Not to my knowledge.

4404 Q. Are you related to any of them?

A. I am not.

4405 Q. Now, the plaintiff claims that not only the officers of the Life Insurance Society dominate the company of which you are a stockholder, but that the stockholders of

Radio Station WOW, Inc. favor the acquisition by Consumers of the power facilities here in Omaha and this state that are owned by the Nebraska Power. What is the fact as to that?

A. I think that is untrue.

4406 Q. Has any discussion of the power issues ever come up at any of your meetings?

A. No, sir.

[fol. 965] 4407 Q. Either before or after the incorporation?

A. No, sir, it has not.

4408 Q. Well, I might as well ask you as long as you are on the stand, do you favor the Consumers taking over this plant here, or don't you?

A. It doesn't make any difference to me, to express myself. I am interested in buying bonds, if I make my position clear. If Omaha buys it, I naturally want to bid on the bonds. I am interested in the purchase of bonds. It makes little difference to me who buys it.

4409 Q. Well, let us assume the Consumers bought it. Do you have any assurance that you will part-cipate in the sale of the bonds that might be issued?

A. Only in the event that we were successful on our negotiations—or rather our bid was accepted.

4410 Q. Is it possible that the Consumers might acquire this plant here and you not get a chance to sell these bonds?

A. Yes, sir.

4411 Q. Well, did the fact that you might participate in the sale of these bonds if the Consumers did buy, did that prompt you to go into this venture?

A. No, sir.

4412 Q. Well, did the fact that you sell the securities to the officers to the Woodmen of the World Life Insurance Society motivate you in any way in becoming a stockholder in the new company?

A. No, sir.

4413 Q. Why did you become a stockholder in this Radio Station WOW, Inc.?

[fol. 966] A. Because I thought it was a good investment. It was a group of men in whom I had confidence, and I wanted to be associated with.

Cross-examination.

By Mr. Crossman:

4414 Q. I have one question, Mr. Meyers. This question perhaps goes even a little further than Mr. Massey has suggested. It is charged that there was a fraudulent scheme conceived by the seven officers and directors to sell this station to the corporation of which you are a stockholder, for the purpose of using the station to put out propaganda in favor of the purchase of the Nebraska Power Company by the Consumers Public Power District. Now, what do you know about that?

A. Why, I think that is ridiculous.

4415 Q. When did you first hear of it?

A. Well, I believe when the petition was filed with the court.

4416 Q. Let's be specific. In whatever negotiations you had, and whoever talked to you about becoming an incorporator and stockholder, was any such thing ever said to you?

A. No, sir.

4417 Q. By any person?

A. No, sir.

Cross-examination.

By Mr. Stewart:

4418 Q. Mr. Meyers, you say it does not make any dif- [fol. 967] ference to you whether the Consumers gets the power facilities in Omaha here or not?

A. That is right.

4419 Q. Is that right?

A. That is correct.

4420 Q. The syndicate with which you are connected has acquired the bonds on every one of the previous Consumers purchasers, has it not?

A. That is correct.

4421 Q. And about how many purchases does that include?

A. Somewhere between forty and forty-five million.

4422 Q. Well, it is fair to assume that they will handle the bonds of this Omaha concern, isn't it?

A. I hope they will, but there is no assurance of it.

4423 Q. And if the Consumers does not acquire the Omaha facilities, why, then you don't sell any of those bonds, do you?

A. Well, if someone else acquires the Nebraska Power Company, I hope to participate, yes.

4424 Q. Well, has anybody else made an offer for the Omaha facilities?

A. Well, there hasn't been any deal yet.

4425 Q. Well, the Consumers is anxious to acquire it, and they have made an offer?

A. That is true, but it has not been accepted. So as far as I know, there is no deal.

4426 Q. The Woodmen of the World Life Insurance Society is your largest customer, isn't it?

A. That is correct.

4427 Q. And you are still continuing to offer and sell them securities?

A. That is correct.

[fol. 968] 4428 Q. Are you a friend of all these individual defendants in the case?

A. Well, that depends on what you mean by friend. I know them well, and I know all of them. There are four or five of them that I know quite well, and there are some of them I don't know quite so well.

4429 Q. Well, you really consider Mr. Bradshaw one of your friends?

A. I do.

4430 Q. Colonel Patterson?

A. Patterson; correct.

4431 Q. Mr. Newberry?

A. That is right.

4432 Q. Mr. Ruess?

A. I just know Mr. Ruess, but not very much.

4433 Q. Mr. Miller?

A. I just know him. I don't have any special acquaintance.

4434 Q. Who first mentioned to you the possibility of your taking an interest in the company that was going to acquire the station?

A. Mr. Bradshaw.

4435 Q. About when was that?

A. I believe I testified around April or May, along in there somewhere; I am not quite clear, but it was in the spring of 1942.

4436 Q. Did you have any further discussion with Mr. Bradshaw or anyone else concerning your participation in the new company until the day that the incorporators met for their first meeting?

A. Yes; I believe I talked to Mr. Gillin just before that time.

4437 Q. Do you recall about how long before that time?

A. No; I am not just clear on it. It was shortly before.

[fol. 969] 4438 Q. You mean a matter of a few days or weeks or months?

A. A week or something like that.

4439 Q. A few days?

A. I don't know just exactly when it was.

Witness excused.

(5:15 o'clock P. M., March 8, 1943, adjournment until 9:30 o'clock A. M., March 9, 1943.)

9:30 A. M. March 9, 1943

Court convened pursuant to adjournment, same parties present as before and the following proceedings were had:

J. J. Isaacson called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Massey:

4440 Q. Will you state your name and address, please?

A. J. J. Isaacson; 1532 South 90th Street, Omaha, Nebraska.

4441 Q. What is your business, Mr. Isaacson?

A. Activities Manager for Ak-Sar-Ben.

4442 Q. How long have you held that position?

A. A little over ten years.

4443 Q. Are you acquainted with the defendant in this case, De Emmett Bradshaw?

A. I am.

4444 Q. Is that acquaintanceship personal or business?

[fol. 970] A. Personal.

4445 Q. Would you say you are a close friend of his or casual?

A. Just casual.

4446 Q. Do you know Colonel Patterson?

A. Slightly.

4447 Q. Have you ever had any business connection with him?

A. None.

4448 Q. Do you know Farrar Newberry?

A. Slightly.

4449 Q. Any business connection with him?

A. None.

4450 Q. How about William Ruess?

A. Just know him slightly.

4451 Q. And have you had any business connection with him?

A. No; I don't think so.

4452 Q. How about Mr. Braden?

A. Just met him since about the time the trial started.

4453 Q. You didn't know him before that time?

A. No, sir.

4454 Q. Mr. R. E. Miller, do you know him?

A. Haven't met him yet.

4455 Q. How about Mr. Holston?

A. Haven't met him yet.

4456 Q. Now, you are a stockholder in Radio Station WOW, Inc., are you not?

A. Yes.

4457 Q. How many shares do you have of common and preferred?

A. Fifty each.

[fol. 971] 4458 Q. What did you pay per share for the preferred stock?

A. $99.00.

4459 Q. And what did you pay per share for the common stock?

A. $1.00.

4460 Q. How did you pay for that stock?

A. By check.

4461 Q. Your personal check on the bank?

A. Yes sir.

4462 Q. What bank?

A. Omaha National.

4463 Q. Did you borrow the money represented by that check?

A. I did.

4464 Q. Where?

A. Omaha National.

4465 Q. Were you required to post collateral for that loan?

A. Yes.

4466 Q. What collateral did you post?

A. Oh, various securities; some insurance policies.

4467 Q. Did you pledge the stock in this new company as collateral?

A. No sir.

4468 Q. Where are your stock certificates?

A. In the safe at my office.

4469 Q. Whose certificates are they?

A. Mine.

4470 Q. Does anyone else have any interest in the stock?

A. None whatever.

4471 Q. Now, the plaintiff alleges that the leasing of this station is a part of a plan whereby the officers whose names I have mentioned in some way will participate in the man- [fol. 972] agement and profit of the new company, if any: is that a fact?

A. It is not a fact.

4472 Q. Is there any understanding that any of them shall in any way participate in your ownership?

A. Not in the least.

4473 Q. Or in any of the benefits that might accrue from the ownership of the stock?

A. None whatever.

4474 Q. Is there any understanding or agreement either oral or written, presently effective or to become effective in the future, whereby any of the men named or any of their friends or any of their relatives shall in any way be entitled to acquire any interest in your stock?

A. No.

4475 Q. Or in any benefits accruing from that stock?

A. No sir.

4476 Q. Now, Doctor Johnson alleges in his petition that the officers of the Society dominate and control Radio Station WOW, Inc.: what is the fact as to that?

A. It is absolutely untrue.

4477 Q. Who does dominate and control Radio Station WOW Inc.?

A. No one but the stockholders.

4478 Q. Are you related to any of the officers of the Society that I have named?

A. No sir.

4479 Q. Or are any of your asociates, to your knowledge, related to them?

A. No sir, not to my knowledge.

4480 Q. Has any officer of the Society or any director of [fol. 973] it suggested to you that you should take this or that action with reference to the new company?

A. No sir.

4481 Q. What was the reason for your buying stock in this new company?

A. Oh, I thought at the time it might make a good investment.

4482 Q. How long have you known John Gillin?

A. Oh, probably fifteen years.

4483 Q. Who first approached you on the proposition of becoming a stockholder in this company?

A. Mr. Bradshaw first mentioned it to me.

4484 Q. When?

A. In my office one day last summer; I don't remember just exactly when. He dropped in about another matter and in the course of the conversation stated that the Woodmen would have to get rid of the Radio Station for tax reasons and other reasons such as the bother it was to them and so on, and that Johnny was forming a company to endeavor to purchase or lease it, and he thought it might make a good investment and if I was interested I should get in touch with Johnny and talk to him about it, which I did.

4485 Q. Now, the plaintiff charges that not only the officers of the Society dominate and control this new company but the new company is dominated by and interested in seeing that the Consumers Public Power District acquire the facilities of the Nebraska Power Company here in the city: is that a fact?

A. No sir.

4486 Q. What is your attitude on the sale?

A. I don't know anything about the sale but I am not a [fol. 974] believer in public ownership.

4487 Q. You are opposed to it then?

A. I am opposed to public ownership generally and this is no exception so far as I am concerned.

4488 Q. In the Ak-Sar-Ben who is your immediate boss?

A. Mr. Davidson.

4489 Q. And Mr. Davidson is president of the Nebraska Power?

A. Yes.

4490 Q. Now, at any time previous to the incorporation of Radio Station WOW Inc., was any reference ever made by anyone referring to the proposed purchase by the Consumers of the Nebraska Power?

A. I don't recall of it ever being mentioned at any time, at any meeting.

4491 Q. Did you hear it mentioned after the company was incorporated?

A. No. Some of the boys might have kidded Myers, something like that, razzed him, that he didn't have a chance.

4492 Q. Was that before or after this law suit?

A. Oh, I don't remember. The law suit had nothing to do with it, and the Consumers had nothing to do with the formation of the company.

4493 Q. Did the officers of the Woodmen of the World Life Insurance Society have anything to do with the formation of the new company?

A. Well, I don't think so. When I went into the picture Johnny Gillin seemed to be the man who was the guiding figure and it was largely because he was that I made my investment because I knew John was an outstanding man in radio, and I was willing to take a little bet on him.

[fol. 975] By Mr. Crossman:

4494 Q. Did anybody else furnish personal security on your loan at the Omaha National Bank?

A. No, sir.

4495 Q. Did anybody else put up collateral in connection with your loan?

A. No, sir.

4496 Q. Did anybody else take up with the Omaha National Bank the matter of your loan other than yourself?

A. No, sir.

Cross-examination.

By Mr. Stewart:

4497 Q. Did I understand you to describe your friendship with Mr. Bradshaw as casual?

A. No; I didn't say that: he asked me if it was social or business, and I said social.

4498 Q. How long have you known Mr. Bradshaw, about?

A. Well, I think probably ten years, just since I have been with Ak-Sar-Ben. He is on the Board of Governors.

4499 Q. Is the Board of Governors the group that is in charge of Ak-Sar-Ben Activities?

A. Yes, sir.

4500 Q. And that is the group that employs you?

A. Yes, sir.

4501 Q. Now, after you talked with Mr. Bradshaw when he first mentioned your participating in the new company, when did you next talk to Mr. Bradshaw about that?

A. I don't believe I ever talked with Mr. Bradshaw again. I don't recall now—it has been quite a while ago—[fol. 976] but my conversations from that time on were with Mr. Gillin until we met to form the company.

4502 Q. Was that the day of the first meeting of the incorporators?

A. Yes, I guess so.

4503 Q. Where did that meeting take place?

A. Mr. Bradshaw's office.

4504 Q. And all the incorporators were there at that time?

A. All but one; Samardick was not there; he didn't come in until the next day.

4505 Q. At that time there were some changes made in the proposed lease, weren't there?

A. Yes, sir.

4506 Q. What was the nature of those changes?

A. Well, I don't remember now. There was a general discussion; we all looked over the lease, and as I recall the lease was passed around back and forth.

4507 Q. Was any change made in the amount of rent that was to be payable?

A. I don't recall.

4508 Q. Did you at that time know Guy Myers?

A. That is the first time I ever saw him.

4509 Q. Did you know Guy Myers was going to be in the new company prior to that day?

A. No.

4510 Q. Did you know prior to that day whether the new company was buying or merely leasing the new station?

A. I didn't know for sure because I had talked with Johnny at different times, and he said they might have to

go to a lease basis. He didn't know what would develop [fol. 977] definitely on it and we didn't know what would develop until that morning.

4511 Q. What was the amount that you invested in your stock?

A. $5000.

4512 Q. Did you vote to issue to Gillin 250 shares of preferred stock B at a dollar a share?

A. Yes, sir.

4513 Q. You know that that stock is redeemable at $99.00 a share?

A. I suppose it is. The National debt is redeemable too, but I don't suppose it will be for another century or two, and I suppose that is the way it is with that stock of Johnny's.

4514 Q. It is redeemable at $99.00 a share?

A. Yes.

4515 Q. What was the reason his preferred stock was issued at a dollar a share while all the rest of you paid $99.00 a share for it?

A. We wanted Johnny so bad we wanted to make it attractive for him.

4516 Q. Was there any question about getting him as manager of the company?

A. Well, I don't know whether there was any question about getting him as manager but there is a question of keeping him; he is very much thought of in the radio world and probably could have left Omaha long ago and could have gotten much more remuneration possibly if he didn't have his family, I suppose, and home here.

4517 Q. Were the Articles of Incorporation already prepared and submitted to the incorporators that day in Bradshaw's office?

A. I don't remember whether they were submitted that day; I guess so; I think Mr. Matthews drew those up, or drew up a set to bring in the next day. They were discussed.

[fol. 978] 4518 Q. Were there any changes made in them after they were submitted to the incorporators?

A. I don't recall.

Mr. Stewart: I think that is all.

By Mr. Crossman:

4519 Q. One question: on the day of the incorporators meeting in Mr. Bradshaw's office did Mr. Bradshaw participate in the meeting?

A. Not in the incorporators' meeting. He participated in the discussion of the lease; he participated in that discussion but he left the office and went into another office when the incorporators had their meeting.

(Witness excused.)

[fol. 979] JOHN J. GILLIN recalled as a witness in behalf of the defendants, testified as follows:

Direct examination.

By Mr. Massey:

4520 Q. Mr. Gillin, I will hand you an instrument marked Exhibit 35——(interrupted).

The Court: Hasn't that been identified before?

Mr. Crossman: Judge, Mr. Bradshaw used that in his testimony without identifying it; for that reason we thought it should be introduced.

4521 Q. Mr. Gillin, I hand you an instrument marked by the reporter Exhibit 35, and ask you to state if you know what that is?

A. Yes, sir; I do.

4522 Q. By whom was it prepared?

A. This is a Field Intensity Survey prepared by William Kotera, Chief Engineer, station WOW, according to the rules and regulations of the Federal Communications Commission and also under the standards and best engineering practice of the National Broadcasting Company.

4523 Q. Was it prepared at your direction and under your supervision?

A. Yes, sir.

4524 Q. And do you know of your own knowledge that the data, whatever is set forth there, is correct?

A. Yes, sir; it is.

4525 Mr. Massey: I offer Exhibit 35 in evidence.

Mr. Stewart: No objection.

4526 The Court: Is it admitted that this is the same instrument Mr. Bradshaw used?

Mr. Stewart: We will admit that it is.

[fol. 980] The Court: Received.

Exhibit 35 received in evidence, same being made a part of this Bill of Exceptions and being attached hereto as follows:

(Here follows Exhibit 35, side folio 981)

RADIO STATION WOW

FIELD INTENSITY SURVEY

Completed March 1, 1941

by W. J. KOTERA, WOW Chief Engineer

WOW COVERAGE

The shaded red defines the area throughout which Station WOW delivers a signal sufficient to insure satisfactory reception both day and night. The outer boundary of the shaded red is the ½ millivolt contour.

Both the method and equipment used in the field tests are standard, and approved by the Federal Communications Commission and

You Can Dominate the Omaha Great Plains Market WITH WOW

[fol. 982] 4527 Q. Mr. Gillin, will you explain briefly so the court will understand—now, leave out the technical terminology—what that map shows, what it means?

A. Well, it means that the shaded area or rather within the shaded area——(interrupted).

4528 Q. Shaded in red?

A. Shaded in red—WOW delivered a signal to insure satisfactory reception both day and night.

4529 Q. (By the Court) What do you mean by "signal"?

A. Broadcast signal—I mean by that, that the broadcast program is so strong in that shaded area it can be heard both day and night any time a person should decide to use the facilities of WOW and turn to the broadcast of our program on 590 kilocycles.

4530 Q. Does it mean you can satisfactorily hear your program in that shaded area?

A. yes.

4531 Q. At all times?

A. At all times.

4532 Q. That is, there is a minimum of fading out, a minimum of static, and so on?

A. Yes. However, I would like to explain, if I may, there are within this shaded area a station that broadcasts on the same network of programs as we do, Sioux Falls, South Dakota, a radio station that broadcasts the same programs we do, at Ames, Iowa, WHO, a 50,000 watt station, and also a station at Kansas City, Missouri, which is also within this shaded area, WDAF owned and operated by the Kan-
[fol. 983] sas City Star, which broadcasts the same network programs that we do, and therefore the people in the areas near those stations will prefer to listen to those stations because the program comes in with much better reception than it does with the WOW, and also because of the fact signals broadcast through those stations will contain local news and items, say those in Kansas City, Missouri will contain news which they are concerned about and which we are not concerned about in Omaha from a local standpoint.

4533 Q. Is this true: beyond the shaded area on that map reception of WOW programs is unsatisfactory and therefore not listened to generally?

A. Generally speaking that is true.

4534 Q. Now, you mentioned WHO is a 50,000 watt station. Let us have an explanation for the court: is 5 kilowatts and 5000 watts the same?

A. 5 kilowatts and 5000 watts is the same.

4535 Q. All right. Tell the court what the difference is between a 5000 watts and 50000 watts station.

A. We have three categories: we have a clear channel station—a clear channel station is a station that operates at 50,000 watts or more and operates on a frequency on which there are no other stations located on that same wave length in the United States, except maybe if there is a station on one coast they put another station on the other coast but they are so far separated from each other they will not interfere with each other. Then we have what is called a regional channel station. We are a regional station located on 590 kilocycles. Those stations are set [fol. 984] up to do a regional job. I mean by that, to cover portions of three or four states, or maybe two states, depending on the frequency. KOIL here in Omaha is a regional station located, I think, on 1290 kilocycles, but their frequency is not as good a frequency as our frequency. That isn't their fault. Their frequency does not cover the area WOW frequency does. That is due, first of all, to the frequency, 590 kilocycles.

Now, we have a third cycle of stations called local channel, like KBON here in Omaha. That has a local frequency and that is set up to do nothing more than to cover the actual city and say, an area ten miles around the city with the broadcast signal. That is the three classes of stations, clear channel, regional channel and local channel. For instance, on the local channel, you have got a station located, I believe, in Kansas City, on the same channel you have KBON, and you may have a station located in St. Paul, Minnesota or you may have a station located in the eastern part of Iowa. On your clear channel stations, their frequency, you have a station in Boston owned by the Columbia Broadcasting System, and you have a station at Spokane, Washington, KHQ, owned by Louis Wasmer, Inc.; and you have a station owned by the Fort Industries of which Mr. Ryan, who testified, is a Vice-President of same and General Manager, WAGA, on our frequency, 590 kilocycles, at Atlanta, Georgia. You have

a station which is owned by John E. Fetzer at Kalamazoo, Michigan, WKZO, on our frequency. We call him the interloper; he shouldn't be there. We have a station that applied for 590 kilocycles, and they have it now most likely, and that is station KGGM, and that station is located at [fol. 985] Albuquerque, New Mexico. Now, there is also another small station of 250 watts which is an interloper. It is in Texas. There is another station at *Uniontown, Pa.*, WMBS, and one in *Cuba, CMCY*.

4536 Q. Do those station- interfere with you here?

A. WKZO interferred with us in about four counties in Iowa, the counties above Sioux City and in Woodbury County, they give us some interference up there. You see the reasons I gave you those categories, and you see how the stations are on our frequency, and how close the stations are in the local channel. On WHO frequency, which is 1100 kilocycles, there is no other station in the United States on their frequency so they could go to 500,000 watts if the Federal Communications Commission gave them permission to do so.

4537 Q. If they went to 500,000 watts could they be heard all over the United States?

A. Oh, yes, very easily.

4538 Q. If you were on 50,000 watts could you be heard all over the United States?

A. On 590 kilocycles, yes, you would have as much coverage on 5000 watts as WHO on 50,000.

4539 Q. Is it possible for you to go to 50,000 watts?

A. No, sir, impossible to do so.

4540 Q. Is that against the rules of the Commission?

A. That is against the rules of the Commission. We have the top power we can possibly receive from the Federal Communications Commission, under which we operate today.

4541 Q. Then, Mr. Gillin, it is true that the program [fol. 986] you set forth will not be heard by the entire membership of the Society unless you are on a clear channel?

A. It would be impossible for the membership of the Woodmen of the World Life Insurance Society to hear it unless we were a clear channel and had at least 100,000 watts.

4542 Q. Now, Mr. Bradshaw in his testimony, I believe, in a report stated that your station could be heard in Illinois and Arkansas and a few other distance states: tell us a little bit about that. Is it possible for you to be heard outside that shaded area on the Intensity Map?

A. Yes; on what we call a good radio night, you might be able to hear us in Wacker Drive or say Michigan Boulevard in Chicago. I have heard WOW on a car radio on Michigan Boulevard in Chicago on a clear winter night.

4543 Q. Is it true you might hear that one night and then not be able to get it again for several nights or weeks?

A. That is right. Also, you must take this into consideration, that you have as I stated to the Court, that you have in Chicago or other cities of any particular size whatsoever, stations who broadcast the same network programs we have here in Omaha, Nebraska, that same program at the same time, the same night, and you cannot expect people in Chicago, if it were possible for them to hear us in Chicago, to prefer to hear WOW rather than the same program on WMAQ because WMAQ is located right in their midst, nor can you expect people here in Omaha to prefer the WMAQ program to WOW program because they are the same type of program. So far as the network is covered WOW actually covers it better in Omaha, or WMAQ in Chicago.

[fol. 987] 4544 Q. Now, there is some kind of rules promulgated by the Federal Communications Commission sometime in 1941 affecting the broadcasting industry generally: explain what those rules are and what they do to the business generally.

Mr. Stewart: That is objected to as immaterial, incompetent, calling for a conclusion of the witness, and not an issue in this case.

4545 Q. Mr. Gillin, yesterday you identified Exhibit 31, to be a copy of the orders of the Federal Communications Commission promulgated May 2, 1941. We have been unable to locate that exhibit here and I will ask you whether the instrument marked Exhibit 31 A is a photostatic copy of that instrument?

A. It is, Sir.

4546 Q. And are your familiar with the requirements set forth in that order, and from your experience as manager of the Broadcasting Station are you in position to stste

what effect the enforcing of those regulations will have on the broadcasting station generally?

A. Yes; I am.

4547 Q. What will the effect be?

Mr. Stewart: Objected to as incompetent, irrelevent and immaterial, not tending to prove or disprove any issue in this case, the matter now pending in the Supreme Court of the United States.

The Court: Well, if it shows how it will affect it, it may be an element to take into account: you may answer.

4548 Q. Explain what force and effect those regulations would have on the broadcasting industry generally, and whether or not the enforcement on WOW specifically will [fol. 988] affect its earnings or earning capacity?

A. Well, in the first place, under this order the National Broadcasting Company will separate its two networks. It had the Blue Network and the Red Network. We simply had only one net work; the National had two networks, the red and blue. Under those regulations they must separate those networks, being each one a separate entity, separate program department, separate commercial department, separate managerial department—all the way down the line. That has been done. The Blue Network, when you hear it on the air, says "This is the Blue Network", and the National Broadcasting Company, which used to identify its Red Network says merely now "This is the National Broadcasting Company". Consequently, if the decision is favorable to the Federal Communications Commission it will kill what is commonly known as exclusive contracts between networks and their affiliated independent stations as WOW is an affiliate of NBC, independently owned but affiliated with it from the standpoint of the network service. In the past what has happened is we have taken a segment of hours, nine o'clock in the morning to 11 A. M., and some 125 stations have said that is the time you can sell to National clients and you can guarantee that time over these 125 stations stretching from New York to San Francisco and from the southern border to the Canadian border. The National Broadcasting Company, due to the fact they could guarantee that time went out and sold that time to National products like Proctor and Gamble, General Mills and other big advertisers. The same thing happened at night from six

[fol. 989] to 6:30 NBC time, and 7 to 10:00. That is when your big programs come in.

Now, with any of these stations, the Federal Communications Commission has said you can't have an exclusive contract with them for longer than one year, and also if the client desires to use KFAB in this market instead of WOW he can demand of NBC to use KFAB and delete WOW from the network, so instead of tuning your radio in and going to WOW for a program like Jack Benny, Bob Hope, Fibber McGee and Mollie, and Red Skelton, you will have Red Skelton maybe on KFAB, you will have Bob Hope on KBON and Fibber McGee and Mollie on KMA, and they are all NBC programs. So you will not have any tuning to a particular station so as to get the programs of any one network. They will be spread all over. At the same time, if Columbia came into the market with a program and offered it to us and NBC had that time not sold on WOW and we take that Columbia program, it would simply mean this, that KFAB would not receive that program. It means the breaking down of the American system of broadcasting; that is what these rules and regulations will do, and in the last analysis they will bring about a chaotic condition in our industry. For instance, when a client would call in for announcements, if you can get say, 7 P. M. time across the country or 5 P. M. time, because maybe you can't get that time across the country on the networks, what would you do? You would say to your advertising agency, you go across the country and pay 20 per cent higher for this time and you buy it from the station, and in the last analysis, [fol. 990] the big advertising agencies that have large advertising accounts like Blackett, Sample and Hummert, who have General Mills who buys an hour in the day time Procter and Gamble who buys an hour and a half in the day time, American Home Products that buys one hour in the day time—that agency controls the three account—that agency could go across the country and work on these individual stations, on stations in every market, and say here is three hours of advertising; we are going to give it to you and we are going to expect you to give us a 50 per cent reduction in rates ordinarily paid for the work, if you don't want it you don't need to take it from us, but we are going to give it to you on a block booking basis at 50 per cent under your rates—ordinary charge—if you want the business okeh; if you don't we will give it to somebody else.

4549 Q. In your opinion, will that happen?

A. That will happen if these rules and regulations go into effect, as sure as I am sitting here, and I testified to that before the Interstate Commerce Committee, before Senator Wheeler of Montana; you can find that in the record in Washington.

4550 Q. Well, let's go now to something easy. Do you think you can explain it so that the lawyers here and the court can understand just what is meant by frequency modulation and by television and facsimile and all these technical terms that have been used here?

A. Well, if you give me the right I can read the technical definition and then try to explain it to you in the terms of the ordinary layman.

[fol. 991] 4551 Q. I don't believe Mr. Stewart will have any objection to that. We all want to know what it is.

A. Both frequency modulation and amplitude modulation are methods of impressing the signal to be transmitted on the radio frequency carrier we have, emitted by the transmitter. Amplitude modulation is the method in use by broadcast stations at the present time. In this method the radio frequency carrier is maintained at a constant frequency, that is, cycles per second, the same number of cycles per second, and the power output varies according to the signal being transmitted, in other words, the *instantaneous* power of the wave being transmitted, consequently its strength at the receiver varies continually according to the signal being transmitted. In frequency modulation the power output of the transmitter is maintained at a constant level and the radio frequency carrier varies in frequency, that is, it varies in cycles per second, according to the signal being transmitted, therefore the signal at the receiver is always at a maximum and does not vary with modulation. The frequency range allowed by the Commission for high fidelity broadcasting when using frequency modulation is 75 kilocycles or 75,000 cycles. That modulation carrier will vary in frequency within this band according to amplitude of the program being transmitted. Now, in amplitude modulation which is technical—it is technical to beat the band—I think I can best explain it in this fashion: your program varies, that is, the power of the program and strength of the [fol. 992] program varies according to the amplitude and amplitude modulation.

4552 Q. What is an amplitude power tube?

A. An amplitude power tube—in other words, if you took a lamp out there and that lamp was attached to our transmitter, it would show up in varying degrees of light, in other words, when the program was using our special 5000 watt power transmitter it would be full, as it is now, and then it would drop when someone was speaking very softly into the microphone—maybe it would drop down to 500 watts power. In other words, that varies with the program at the transmitter. Under frequency modulation the frequency varies as to the program; in other words, that light under frequency modulation would be constant, would be the same degree of light at all times, but the program itself would swing between this 75,000 cycles band. In other words, you have a band there and the program varies with those cycles—it could go 37,500 cycles to the right, so to speak, and 37,500 cycles to the left. Now, that is the difference. If you use frequency modulation with our regular amplitude band, you would only be able to have eight or nine stations on the amplitude band. We can only vary 10 kilocycles each way. There is WJBW at Tacoma, and there is another station over at Cedar Rapids, WMT—it is on 600 kilocycles. Now, that means we can only vary 10 degrees or we interfere with those stations, but if we had frequency modulation on 590, then the Commission would protect us for 37,500 cycles on each side. Do I make myself clear?

[fol. 993] The Court: Well, I know something about it but not very much.

4553 Q. Well, John, is this a correct statement: in amplitude modulation the power tube varies so that your light at one point in the program will be at maximum intensity and when someone is speaking softly it will be dim?

A. That is right.

4554 Q. Whereas in frequency modulation the lamp is constant all the time?

A. Yes.

4555 Q. Now, I think we got down to the point where frequency modulation, a constant power job is to be much preferred to amplitude modulation. The static in our programs, is that governed by anything, by frequency?

A. That is governed by frequency modulation and not by amplitude modulation.

4556 Q. Then frequency modulation will wipe that out: is that the purpose of frequency modulation?

A. That part, static, decidedly will be suppressed in the receiver.

4557 Q. And the receiver will take any frequency modulation and any amplitude?

A. That is right, designed for frequency modulation.

4558 Q. (By the Court). What I got was that the Commission guarantees a wider spread on the amplitude modulation.

A. Your Honor, the frequency modulation band is from 40—the first band for frequency modulation is from 43,000 to, I think, possibly 50,000 megacycles, that is millions of [fol. 994] cycles, that is, the 590 kilocycles now, in other words, our present amplitude band, is from 590 to 1500 kilocycles, and frequency modulation is way up here (indicating), 43,000 megacycles, about 50 millions of cycles, and the second band will be about 52 megacycles to 60 megacycles, and the present band that was being thought to be used for our television is way up above that—way up above that.

4559 Q. Just what is the effect upon the receiver, the effect upon us that are listening? Do we hear the program without static—is that the purpose of it?

A. Well, I think you have a much higher fidelity of broadcast under frequency modulation. When I say higher fidelity of broadcast I mean you will be able to hear much more clearly, will be able to hear the higher notes and lower notes and will be able to get a better idea of the program in your ear.

4560 Q. The whole scheme is to eliminate man made interference?

A. Man made interference—that is right.

4561 Q. Now, let us not go any further than that, because every time you open up there we have something new to explain. What is television? Is that home movies or what?

A. No—television is merely the moving pictures being transmitted at a very rapid rate to give the illusion of fast motion.

4562 Q. Will it throw it on a screen on the radio so we can see them at the same time we hear them acting?

A. That is right.

4563 Q. Just some motion pictures?

A. That is right.

[fol. 995] 4564 Q. Now, let us assume after the war television becomes a fact: what would you have to do in order to equip yourselves to transmit that type of program? Would your present equipment handle it or would you have to have new equipment?

A. Oh, no, our present equipment wouldn't handle it at all.

4565 Q. If you switched to television would your present equipment become obsolete?

A. Yes.

4566 Q. In addition to what you have now, what else would you have to have, stages and costumes?

A. Well, television can be operated on amplitude modulation or on frequency modulation, but from all indications the frequency modulation band, a very high band of frequency modulation will more than likely be used for television more than the amplitude. We would have to have a transmitter which will do that television transmitting and then would have a local transmitter because a television transmitter will only transmit pictures, which it does, breaks them down and transposes them at the rate of 30 pictures per second.

4567 Q. Well, you will not have to have two broadcast stations though?

A. Have to have two broadcasts, one for sound and one for pictures.

4568 Q. Will you have to have stages and costumes and all that the same as in the theatre?

A. We will have to have stages that will cost a lot of money because we will in the essence be in the theatrical business. The announcer will have to give from memory 24 announcements a day; he won't be able to read them; he will have to be able to stand up there and give them from [fol. 996] memory. Reading them, as at the present time, I believe, in Chicago and Hollywood, would not be sufficient. We have people in Chicago now that are on five or six programs a day. What do they do? They generally come and rehearse there forty-five minutes, go on the air at 8 o'clock, immediately go over to WBBM, rehearse there and go on the air, go over immediately to another station, five o'clock they go to another station, seven o'clock they go to another.

Now, the situation is this, that when television comes in they will have to memorize every word of that script—they

just cut up manuscript and read over the air now. It will take a few days to do that. If they don't, they will be out..

4569 Q. It will be like an actress reading her part from script?

A. That is right.

4570 Q. Can you tell us from your experience with radio approximately what the estimate of the cost of that is now?

A. You mean of the equipment?

4571 Q. What is the general idea in the industry of the cost of television to the broadcaster?

Mr. Stewart: That is objected to for the reason that this witness has already said what the cost of that equipment would be when we asked him the other day about an option to purchase this station: he said he couldn't tell what it would be worth because he had no idea what television equipment and frequency equipment would cost.

The Court: You may give your opinion based on facts known.

A. The only opinion I have is based on a talk given by [fol. 997] O. B. Hanson, who is vice-president in charge of engineering, National Broadcast Company on February 27, in Chicago, this year, and he didn't tell about what the stages would cost, or cameras, or lighting effects: he just talked about what the television transmitter itself would cost; and the other day we were talking about the cost of television—nobody knows how much it is going to cost to build a stage down here and buy 200 costumes to put on some opera; I can't tell you that, but I can tell you something from what he said as engineer, as to the cost of the television transmitter.

Mr. Stewart: We object to that as being based on hearsay.

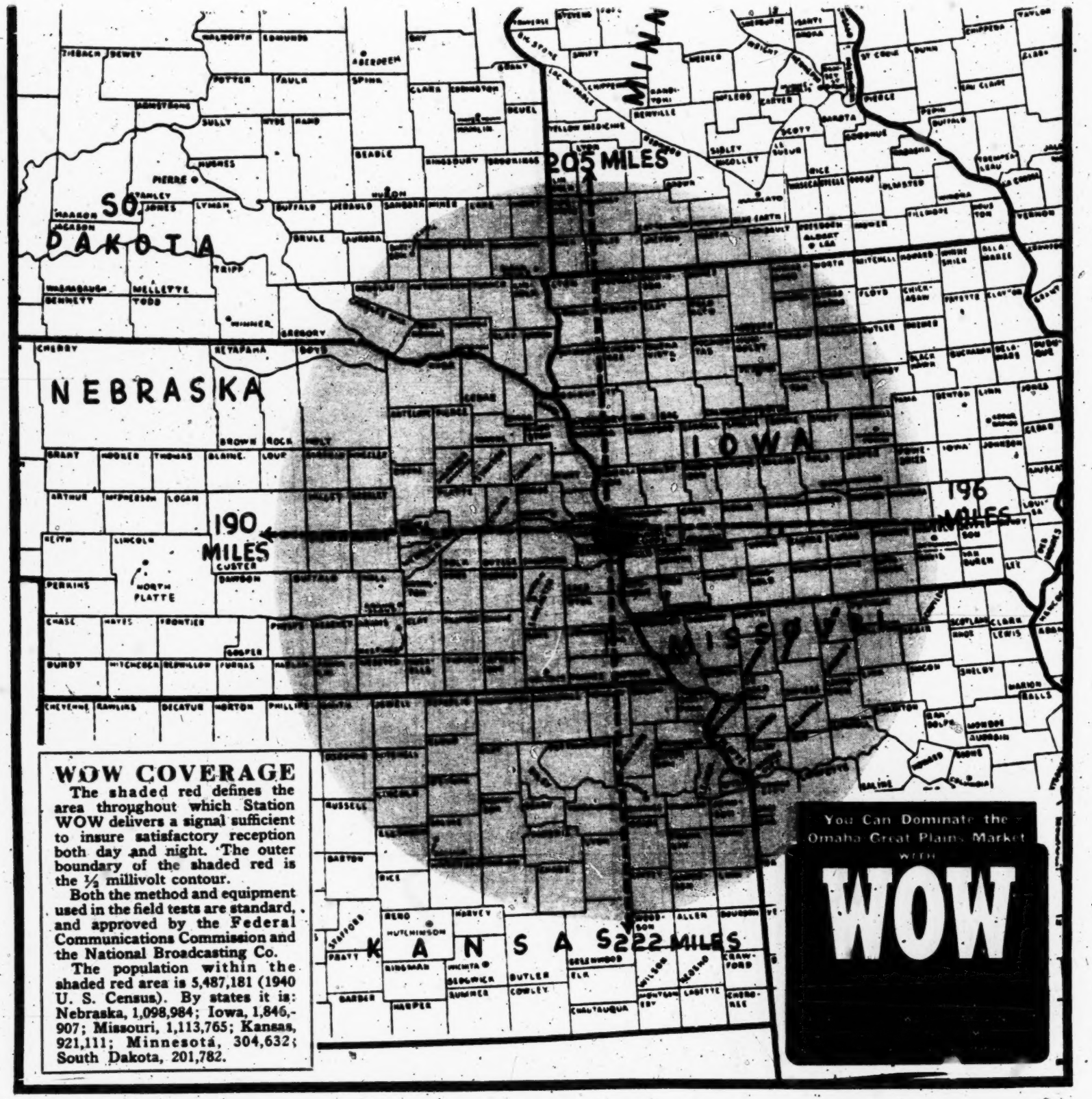
4572 Q. The Court: That is based on supposititious evidence. What is the relative cost of that without saying any.

The Witness: About $250,000.00, the transmitter would cost.

4573 The Court: The transmitter alone?

The Witness: That is about what the transmitter would cost.

4574 Q. Well now, let us go back to the petition, Mr. Gillin. Outside of the technical definitions you have given I think you have testified at great length in this case and you are familiar with the fact that Dr. Johnson charges



WOW COVERAGE

The shaded red defines the area throughout which Station WOW delivers a signal sufficient to insure satisfactory reception both day and night. The outer boundary of the shaded red is the ½ millivolt contour.

Both the method and equipment used in the field tests are standard, and approved by the Federal Communications Commission and the National Broadcasting Co.

The population within the shaded red area is 5,487,181 (1940 U. S. Census). By states it is: Nebraska, 1,098,984; Iowa, 1,846,907; Missouri, 1,113,765; Kansas, 921,111; Minnesota, 304,632; South Dakota, 201,782.

OWNED AND OPERATED BY THE WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY

[Col. 9811 EXHIBIT 35

that you in company with the officers of the Society have devised a plan, you and your associates, whereby the officers of the Society shall gain control of this Radio Station WOW for their benefit and for the benefit and profit of their friends and for the benefit and profit of their associates: what is the fact as to that?

A. That is not true.

4575 Q. Do any of the officers of the Society have any present interest whatever in the station or the new company, or its earnings or operation or management?

A. No, sir.

[fol. 998] 4576 Q. Are you related to any of the directors?

A. No, sir.

4577 Q. Oh, are any of your associates in the new company related to them?

A. No, sir, not to my knowledge.

4578 Q. Now, Dr. Johnson charges that the officers of the Society dominate and control the lessee company: what is the fact as to that?

A. That is not true.

4579 Q. Who does dominate and control the new company?

A. The Board of Directors.

4580 Q. Does anybody else?

A. No, sir.

4581 Q. That is the Board of Directors of the new company?

A. The Board of Directors of Radio Station WOW, Inc.

4582 Q. Is there any understanding or agreement to become effective in the future whereby any of the officers, their relatives or friends shall in any way participate in this new company?

A. No, sir.

4583 Q. Do any of their relatives or friends have any positions with the new company?

A. No, sir.

4584 Q. Is there any understanding they will ever have?

A. No, sir.

4585 Q. Have the officers ever suggested to you that you take this or that action?

A. No, sir.

4586 Q. Now, it is charged that the obvious purpose of this lease is to make the station available to the Consumers Public Power District so that that District can permit its

[fol. 999] friends to acquire the facilities of the Nebraska Power Company: what is the fact as to that?

A. That is not true.

4587 Q. At any time prior or subsequent to the incorporation of the new company was the power issue ever discussed either on or off the record in your meetings?

A. Never discussed.

4588 Q. What is your attitude on whether the Consumers should acquire the Nebraska Power or not?

A. Well, I think the City of Omaha should buy the Nebraska Power Company.

4589 Q. If the City of Omaha does not buy it, where do you think it should rest?

A. Well, I don't know, if it doesn't buy it—I want the City of Omaha to buy it.

4590 Q. Well, if it does not, would you rather see the Consumers buy the Nebraska Power Company?

A. Well, it depends on whether it would have to be sold.

4591 Q. Assume it would have to be sold.

A. I would like to see it stay where it is. I know Mr. J. E. Davidson, they are very good clients, WOW clients, and clients of WOW Inc.

4592 Q. Are the Consumers your clients?

A. I don't think the Consumers have ever broadcast one broadcast through WOW. We would be very glad to have them come in and buy some time on the same basis the Nebraska Power does.

4593 Q. You will sell it to them?

A. We will sell it to them on the same basis as the Nebraska Power Company.

(Change of reporter.)

[fol. 1000] 4594 Mr. Crossman: I understand that you are through with your direct examination, Mr. Massey?

Mr. Massey: Yes, I am through.

Mr. Crossman: No cross examination.

Cross examination

By Mr. Stewart:

4595 Q. Mr. Gillin, did I understand you to say that WOW has as much coverage on 5,000 watts as WCZA has on 50,000 watts?

A. Yes. That is because of the frequency, Mr. Stewart.

4596 Q. Because of the difference?

A. That is because of the frequency.

4597 Q. As I understand it, if these new rules of the F. C. C. go into effect, an advertiser can then select the station that he desires to use in broadcasting his program?

A. I would like to explain that, if I may: At the present time the advertiser must take the station that is associated with the network that he buys time from. In other words, if he buys time from the National Broadcasting Company from 7:00 to 7:30 P. M., he must buy the stations that are associated with NBC.

4598 Q. I am asking if these new rules go into effect, then the advertiser can select the station he desires?

A. Yes, sir.

4599 Q. So that WOW will then have to meet the competition of other stations as to the program that it carries?

A. WOW will then have to meet the competition of the other stations in this city in network broadcasting as well [fol. 1001] as in national spot broadcasting. Today the network takes care of the competition from the standpoint of selling for us. In other words, we will have to do double work then; we will have to go out and sell advertisers individually, whereas now NBC sells the advertiser for us.

4600 Q. That would be true of all stations, wouldn't it: they would have to do the double job of selling, as you say?

A. That is right. And the four stations in the market will receive the four programs that would ordinarily come over their station. It might be a fine program.

4601 Q. Well, do you feel that WOW cannot meet that competition of the other stations if these rules go into effect?

A. I am not so much afraid of WOW meeting the competition as I am that the structural broadcasting will be broken down, Mr. Stewart, and the smaller stations will not have the revenue that they have now, and that the Federal Communications Commission will come along and tell us, as the key station in this market, "WOW, you can only be commercial so many hours a day, in order that this station over here may receive enough programs to keep itself alive": whereas today that station is receiving programs from the network devised exclusively for it now. And if these rules and regulations go into effect, it will break down the present system of block broadcasting.

4602 Q. Which is the network system that you have in mind?

A. It is not a network system, and therefore it will cause a chaotic condition, the book blocking will become effective.

4603 Q. If television goes into effect in your station, then it would require a stage and costumes, would you be able [fol. 1002] to get television programs from the network?

A. Oh, yes.

4604 Q. Well, then don't the network have to furnish the stage and costumes for those programs?

A. They will, but you will still have to do the local work. In fact, you may spend another quarter of a million dollars in greater effective equipment.

4605 Q. Will television increase or decrease the use of radio in the home?

A. I think television will naturally increase the use of radio in the home.

4606 Q. Well, if there is a greater use of the radio in the home, then there will be a greater advertising value, won't there, for the radio?

A. That is right, but don't forget television will cost a whole lot more, much more than the present amplitude broadcasting system of radio units, because of the cost, and it will go up on the advertisers.

4607 Q. Yes, and your prices will go up for time, of course?

A. I don't think your price for time will go up, because you won't be covering any more field than you are at the present time, because television does not contemplate any more radio fields than are furnished today. If you only cover the same field that you have been, you cannot charge any more. It will go into the production of television, stage effects and costumes and so forth—talent.

4608 Q. Well, now, a radio that is used only ten minutes in a day in a home has less value to the advertiser than one that is used ten hours, hasn't it, Mr. Gillin?

A. Who knows whether a radio is used ten minutes or ten hours?

[fol. 1003] 4609 Q. Well, that is not an answer.

A. Well, the question is not proper.

4610 Q. (Question read by the reporter.)

A. A radio that is used ten minutes a day in the home is valuable only to the advertiser that can be heard during that ten minutes.

4611 Q. And if it can be had for his use ten hours a day, why, then, of course, more advertisers can be heard during that time?

A. More advertisers can be heard, yes.

4612 Q. You consider yourself a friend of Mr. Bradshaw's?

A. Yes.

4613 Q. What would you say is the nature of that friendship; is it an acquaintance or a close friendship?

A. I would say it is a close friendship.

4614 Q. What is the nature of your acquaintance with the other directors of the Society that are defendants in this case?

A. I would say they are all friends of mine.

4615 Q. Would you say they are all close friends of yours?

A. Not all close friends, but they are friends.

4616 Q. Which ones of the defendants are not close friends?

A. Well, I don't think that Mr. Stanley Holston could be called a close friend of mine; I don't think that Mr. Miller could be called a close friend; I don't think that—I would say Mr. Ruess, Mr. Bradshaw could be called close friends. I think that Mr. Newberry and the other gentlemen are friends, but they are not close friends—I mean intimate friends.

4617 Q. And those defendants are also or have been your associates during the time that you were operating the station for the Society?

[fol. 1004] A. Well, they were really my bosses; they were the department heads under the Woodmen of the World Life Insurance Society.

4618 Q. It is your intention to retire the A Preferred Stock in the new company before the B Preferred Stock is retired, is that it?

A. Yes, if it is retired.

4619 Q. Yes. And the B Preferred Stock is what you have 250 shares of?

A. Yes.

4620 Q. For which you paid $1.00 a share?

A. Yes, sir.

4621 Q. And that is retirable, is it, at $99.00—or $100.00 per share?

A. I believe it is the same as the other stock, if it is retired.

4622 Q. It is either $99.00 or $100.00?

A. I don't think there is any possibility for retiring that stock for a long, long time, Mr. Stewart.

4623 Q. What do the rules of the F. C. C. require as to the distances between the regional stations?

A. It depends on the frequency. On the frequency that we operate, it is supposed to be a distance of 900 miles; that is what I said: WCZA is one instance, because it is 750 miles from our local transmitter located at 56th and Kansas in Omaha.

4624 Q. Did you at the time you discussed this leasing of the station with Guy Myers know that he was interested in this Consumers deal?

A. I had heard about it. I never talked to him about it.

4625 Q. When you consulted Breed, Abbott & Morgan in New York concerning the leasing of the station, did you then know that they were attorneys for the consumers?

A. No, sir.

[fol. 1005] 4626 Q. You stated that Breed, Abbott & Morgan did not prepare the lease, but only suggested some changes in it?

A. Yes, sir.

4627 Q. To refresh your recollection, I will ask you when your deposition was taken in this case you were not asked these questions, at the top of Page 68: "Q. When was Mr. Matthews first employed by the new company? A. Mr. Matthews was first employed by the new company when he came into the corporation. Q. And about when was that? A. Oh, I would say about—well, I think it was close to or around the first of October."

A. That is right.

4628 Q. "Q. And when was Breed, Abbott & Morgan employed? A. About the first of September. The reason for that was that I was in New York talking to the National Broadcasting Company, and when I couldn't get the amount of money for the sale from the National Broadcasting Company, then I started the lease. I said, 'Please draw up a lease', and Mr. Myers was there and said, 'Why don't we do it right here?' I said, 'Okeh'—so they drew up the lease and I brought it back and showed it to Mr. Bradshaw in Omaha, and I took it over to Mr. Massey."

A. That is right.

4629 Q. "Q. Who suggested the New York firm to whom you went? A. It was not a suggestion, so to speak. It was

merely the happen stance that I was there and I knew the firm of Breed, Abbott & Morgan, and Mr. Myers also knows the firm of Breed, Abbott & Morgan."

Were you asked those questions and did you answer them the way I read them?

[fol. 1006] A. I did, sir.

4630 Q. And is that a fact?

A. That is a fact.

4631 Q. Doesn't that refresh your recollection now that Breed, Abbott & Morgan did draw up the lease for you?

A. That is right. They didn't draw up the lease, so to speak. They put into the lease which was handed to me by Mr. Bradshaw certain particular clauses, or asked that they be included.

4632 Q. There seems to be some question about the $25,000 in accounts receivable, as to how that was—the circumstances under which that was transferred to the new company. To refresh your recollection, I will ask you as to whether or not these questions, on Page 89, were not asked you when your deposition was taken: "Q. What was the reason for including in the lease a transfer of $25,000 of accounts receivable to the new company? A. The reason for that was that Mr. Bradshaw demanded that we have $100,000 in the bank at all times to assure the Woodmen of the World Life Insurance Society of the lease payments, and in order to help us out he stated that he would give us $25,000 in accounts receivable and include that in the lease payment just like he included the National Broadcasting Company contract, the furnishings of the station, the panels, the speech input system, the microphones, pianos, chairs, the pens and pencils, whatever else we had at the time that the Federal Communications Commission approved the lease."

A. Yes.

4633 Q. That is the way you answered the question?

A. That is right.

[fol. 1007] 4634 Q. And that is a fact?

A. That is a fact; it is all included in the lease payments. In fact, we pay 1/180 of it every month for the 180 months that we lease the station.

4635 Q. Now, the new company is planning to have former Senator Norris associated with it, isn't it?

A. No; we have no idea of having Mr. Norris associated with us.

4636 Q. You don't?

A. No.

4637 Q. Have you ever had any negotiations with him?

A. No, sir.

4638 Q. Has the matter ever been discussed with him by anybody, if you know, connected with your company?

A. No, sir, not to my knowledge.

4639 Q. As a commentator or otherwise interested in the company?

A. No, sir.

4640 Q. Not at all?

A. No, sir.

4641 Q. No such plan is contemplated?

A. No, sir.

4642 Q. Has the time that the station is on the air been increased at any time recently?

A. Yes. We are operating twenty-four hours a day. May I explain why we are doing that?

4643 Q. Well, first, tell me when that increase in time was made.

A. I think the increase in the operation schedule of Radio Station WOW from nineteen hours to twenty-four hours a day took place, I believe, in December.

4644 Q. Of what year?

[fol. 1008] A. Of 1942. You see, we are designated a key station in the Seventh Service Command by the Seventh Service Warning Center, and the Seventh Service Warning Center is the warning control in some nine states controlled by the Seventh Service Command; that warning control takes care of all air raid alarms which may come to this territory, and as a key station in the Seventh Service Warning Center we have some forty-six satellite stations throughout the area that we serve that must keep tuned to WOW twenty-four hours a day for any warnings which we may broadcast. That means that we have to keep our carrier wave on the air twenty-four hours a day. Whether we program that time or not, our broadcasting signal is on the air, and we decided to program it so that there would be no question about our being on the air, and also to help entertain the different swing shift people, particularly people that are working at nights and getting off at 11:00 o'clock or 12:00 o'clock or 1:00 o'clock or 2:00 o'clock in the morning.

4645 Q. Is the range of your station WOW greater in the daytime or at nighttime, if there is any difference?

A. I believe because of our frequency and our power being the same both day and night that there isn't much change in the coverage of the station.

By the Court:

4646 Q. I want an explanation of why this change took place.

A. The reason why we increased to twenty-four hours?

By the Court:

4647 Q. Yes.

A. Yes—because we are a key station, your Honor. It only costs us a very little more to program the twenty-four [fol. 1009] hours, because it costs us to stay on the air $1,000 a month, twenty-four hours a day, over what our ordinary expenses would be for nineteen hours a day, and for another $400 we could program that, and so we decided to program it as a service to the public, because we had to spend the $1,000 anyway. That is out-of-pocket expense, that is a cinch. In other words, we had to go on the air twenty-four hours a day; we did not have to program twenty-four hours a day. In other words, put the program on there—and we decided to put the program on because it would be very little more in expense, with the possibility that we may be able to sell some of it.

4648 Q. Have you sold any of that additional time as yet?

A. No, sir, we have not, but we have prospects of selling it; we are optimistic about it, Mr. Stewart.

Mr. Stewart: That is all.

Mr. Massey: That is all, Mr. Gillin.

The Witness: Thank you, sir.

Witness excused.

4649 Mr. Crossman: The defendants Woodmen of the World Life Insurance Society and the individual officers and directors of the same rest.

4650 Mr. Massey: The defendants WOW, Inc. and John J. Gillin, Jr. rest.

[fol. 1010] V. J. PAKES, a witness heretofore called and duly sworn, recalled as a witness on behalf of the plaintiff, and testified further as follows:

Direct examination.

By Mr. Stewart:

4651 Q. Mr. Pakes, Mr. Clark, Dale Clark, president of the Omaha National Bank, testified in this case on March 5th and didn't know at that time the bank balance of the Woodmen of the World Life Insurance Society in the bank. Do you have those figures with you?

A. Yes.

4652 Q. What was the bank balance of the Society in the Omaha National Bank of March 5, 1943?

A. At the close of March 5th the balance was $3,029,465.10.

4653 Q. Mr. Pakes, do you recall who the president of the Omaha National Bank was before Mr. Clark?

A. Mr. Head, I believe.

4654 Q. Walter Head?

A. Yes.

4655 Q. How long have you been connected with the Society?

A. About forty-four years.

4656 Q. Do you recall that Mr. Walter Head, at the time he was president of the Omaha National Bank, bought $50,000 of stock in the Globe Life Insurance Company?

Mr. Crossman: That is objected to as incompetent and immaterial.

The Court: Objection overruled.

A. I have a recollection that he bought some stock, but I am not sure about $50,000.

[fol. 1011] 4657 Q. It was a large amount?

A. Oh, yes, I think it was.

4658 Q. Mr. Pakes, what is the salary of Colonel Patterson as vice-president of the board of directors?

A. $18,000 a year.

4659 Q. And Mr. Miller, the treasurer?

A. $15,000 a year.

4660 Q. Mr. Holston?

A. I don't recollect.

4661 Q. Mr. Newberry?

A. $20,000 a year.

4662 Q. Mr. Braden?

Mr. Crossman: These are all in the pleadings, except Patterson and Holston.

4663 Q. Well, you don't know what Mr. Holston's is?

A. I don't know.

4664 Q. Mr. Pakes, will you examine Exhibit 36 and state if that is a report that was submitted by Mr. Bradshaw as president of the Society to the Sovereign Camp of the Society at Los Angeles, California, June 21, 1937?

A. It is.

4665 Mr. Stewart: We offer in evidence Exhibit No. 36.

(Exhibit 36 so offered, was received in evidence without objection, and is attached hereto, made a part hereof, and is as follows:)

[fol. 1012] EXHIBIT "36"

Report to the Sovereign Camp, De E. Bradshaw, President

Los Angeles, Calif., June 21, 1937

[fol. 1012a] Insurance Building.

The Home Office building, called the Insurance Building, at Omaha, has been under-going rebuilding and improvements for the past three years and it is now completed. It is a very valuable piece of property, well-located. We have re-built the building from the basement to the roof on the inside and it is currently reported that we have now as beautiful and as commodious an office building as there is in the United States. The building proper and the annex are both entirely air-conditioned, which means that in summer and in winter, the air is treated and the offices are at all times comfortable, so that the tenants thereof can perform the maximum amount of work and be assured of better health. We have included in this report, a few cuts of different views of the building, to show its beauty and efficiency.

We occupy about 51% of the rentable area. The other portion is rented to the public. 96% of the rentable area is occupied and we collected last year, rents from this building in the amount of $199,000.00, which yielded us 5½%

interest upon the entire amount invested in the building and improvements. The tenants of the building are so comfortable and contented that on the first of the month, there was not unpaid any amount of rent or service charge.

We have charged off of the cost of the building 2% annually which is called the normal depreciation. In addition to this amount, we charged off last year the sum of $275,000.00 in addition to a charge-off of 10% of the cost of the air-conditioning of the building.

The Radio Station is located on the second floor of the Insurance Building and has the most beautiful offices and studios of any radio station in America. Of course, rent on these quarters would be very high to get a return on the money invested. We therefore require the radio to pay the normal rent upon the space occupied and in addition thereto; 20% per annum of the cost of the extra improvements, for a period of five years. We also own 16 acres of land, out some miles from the city, on which is erected the transmitter and tower and for which the radio station pays a satisfactory rent.

Vice President T. E. Patterson has been very helpful in handling our Real Estate holdings and in looking after the improvements and the tenants, in addition to his other duties.

[fol. 1012b] Tax Litigation

A suit was instituted in Arkansas against this Society for $669,000 for back taxes, in Missouri for $609,000, in Misissippi for a large amount and in Oklahoma for three or four hundred thousand dollars. Suits were threatened in a number of other States.

In Arkansas a judgment was rendered in the lower court for the payment of the taxes against one fraternal. The Supreme Court reversed it.

In the opinion of a three-judge Federal Court in Iowa, the authority to collect the taxes was specifically denied.

In a three-judge Federal Court in New Mexico, a similar decision was rendered.

In Missouri, the suits upon our motion were removed from the State Courts to the Federal Court. On May 29, 1937, the United States Circuit Court of Appeals rendered [fol. 1012c] a judgment sustaining our right to remove said suits from the State to the Federal Courts.

In Oklahoma, judgment was rendered in the State Court against us, but that suit was appealed to the Supreme Court and no decision has yet been handed down.

The suit in Mississippi is dormant.

It is not probable that other suits will be instituted in view of the holdings of State and Federal Courts.

[fol. 1012d] Proposed Tax Legislation

Last year a special session of the Texas Legislature enacted a law for a tax equal to 3¾% annually on the gross collections of Fraternal Societies in that State. We did not have sufficient time to combat the legislation after it was initiated before it was passed. It is gratifying to know that the incoming Session of the Texas Legislature in 1937 promptly repealed the Tax Law.

In New Mexico, however, we were not so fortunate. A bill was proposed and enacted there levying a tax of 2% on the gross amount paid by members of Fraternal Societies. Lawyers say that the act is unconstitutional. We are testing that question now. Other Fraternal Societies have abandoned work in the State. Under our laws this tax in New Mexico must be paid by the member.

Similar tax bills found their way into the Legislatures of many States. Looking after these matters has thrown a great deal of work upon our General Attorney and our State managers. They have all been very effective in the defeat of these bills.

[fol. 1012e] Radio

We own and operate Radio Station WOW, with studios located in our building and the transmitter at 56th and Kansas Avenue.

The total cost of the new installation is slightly over $130,000. During the year, depreciation charges of $27,000 were set up. The Station is amply self-sustaining.

Radio Station WOW demonstrates its usefulness as a means of public service, giving free of charge sustaining and educational programs and news and market reports, an average of four and one-half hours a day.

The station has also devoted much time to the promotion of other public undertakings, such as, Community Chest, and charitable and Red Cross work.

The Station has been a splendid means of publicity for the Woodmen of the World and the occasion of a fine feeling

of fellowship among the several million potential listeners and as far as their influence reaches.

Our affiliation with the Red Net-Work of the N. B. C. is of material value. We have recently entered into a new contract with N. B. C. which we believe will be of financial interest to the Association.

We have recently added another free public service in the establishment of a "Job Clinic" in which, with the co-operation of the State and Federal re-employment agencies, many unemployed are interviewed over the air. It has been quite successful in placing many in positions for which they are best qualified.

In addition to his many other duties Director William Ruess, Chairman of Auditors, spends very much time in managerial responsibilities concerning our radio station.

Our Treasurer, Senator Sheppard, is in Washington, and he gives a great deal of time and active attention to our affairs not only in Radio but in other important matters.

[fol. 1013] 4666 Q. Will you examine Exhibit No. 37 and state if that is a report which Mr. Bradshaw submitted as president of the Society to the Camp of the Society at its meeting at New York City, June, 1939?

A. It is.

4667 Mr. Stewart: We offer in evidence Exhibit No. 37.

Mr. Crossman: No objection.

The Court: Received.

(Exhibit 37 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 1014] EXHIBIT "37"

Our World of Tomorrow

A Report by President De E. Bradshaw to the Sovereign Camp Woodmen of the World Life Insurance Society, Omaha, Nebr. at New York City

June, 1939

[fol. 1014a] Taxation Suits on Members' Payments

We were harassed by a number of law suits seeking to recover taxes on the gross payments made by our members. This was reported to you two years ago in detail. The

amount sought to be recovered in these suits was $1,751,216.29, and if the parties urging this litigation had succeeded in obtaining a judgment or judgments, the amount involved would have been very much more, because suits would have been instituted in a number of other states. Now, we are happy to say that all of these suits have been tried or dismissed, and that all of them have terminated in favor of this Society.

[fol. 1014b] Station WOW

WOW radio broadcasting station has continued to make a very satisfactory record during the years 1937 and 1938. Practically all available time, other than that part devoted to the publicity of the Society, and those periods devoted to entertainment, educational and charitable and public services, is substantially sold. Constant efforts to increase the efficiency and to render greater service have been made.

In the field of religious, educational and good-will work, station WOW continues its laudable and useful services. [fol. 1014c] In 1937 the station was awarded first prize by the magazine "Variety" in recognition of its outstanding showmanship and prestige among subsidiary stations.

The station is entirely self-sustaining, providing ample earnings to create depreciation reserves for the retirement of the original outlay and yielding a return on the cost.

[fol. 1015] 4668 Q. Will you examine Exhibit No. 38 and state if that is the report of President Bradshaw to the Sovereign Camp at its meeting held in San Francisco, California, June 30, 1941?

A. It is.

4669 Mr. Stewart: We offer in evidence Exhibit No. 38.

Mr. Crossman: No objection.

The Court: Received.

(Exhibit 38 so offered and received in evidence, is attached hereto, made a part hereof, and is as follows:)

[fol. 1016] EXHIBIT "38"

Report by President De E. Bradshaw to the Sovereign Camp

"What is there glorious in the world, that is not the product of labor, either of the body or the mind!"—Albert Pike.

San Francisco, California, June 30, 1941

[fol. 1016a] Radio

The WOW Radio Station has been operating 18 years. At present it has reached a high point of usefulness. It is rendering a distinct public service and at the same time is a useful adjunct to the publicity of the Society's activities.

From a financial point of view, it is self-supporting and shows a fair return on the investment.

[fol. 1016b] New Mexico Tax on Payments

In 1937 the Legislature of New Mexico enacted a law requiring the payment of a 2 per cent tax on amounts paid for insurance by members of fraternal societies, such as ours.

Section 26(g) of our Society's laws was invoked to take care of this situation, and the membership of New Mexico responded splendidly to carry out the provision.

The 1941 Legislature repealed the taxing law.

[fol. 1017] Cross-examination.

By Mr. Crossman:

4670 Q. Mr. Pakes, Mr. Stewart inquired of you of the balance shown of the Woodmen of the World Society in the Omaha National Bank at the close of business March 5, 1943. Now, will you also tell me what the balance of deposits was in the Omaha National Bank as of the close of business of these respective dates: February 2, 1943.

Mr. Stewart: That is objected to as immaterial.

The Court: You may answer.

A. Balance in the Omaha National Bank at the end of February 2nd, was $1,459,380.57.

4671 Q. February 8th.

A. February 8th, $1,429,553.71.

4672 Q. February 15th.

A. February 15th, $1,764,364.78.

4673 Q. The 26th of February.

A. $3,085,212.87.

4674 Q. Mr. Pakes, in a very brief way, how do you account for the fact that the deposits of the Woodmen of the World in the Omaha National Bank were up as of or around about March 1, 1943?

A. That was due to the fact that about a million and a quarter in bonds were sold or matured, and those funds were put in the bank.

4675 Q. The money was deposited in the bank?

A. Yes.

4676 Q. For the purpose of being reinvested?

A. That is right.

(Witness excused.)

[fols. 1018-1019] 4677 Mr. Stewart: The plaintiff now rests.

Thereupon the case was argued to the court, argument of counsel not being made a part of this record.

4678 The Court: In the first place, I do not think there is any fraud here: there isn't any evidence of any fraud.

I don't think that the charges made with reference to the public service company have been substantiated; there has not been any evidence at all on that.

Now, taking into account those facts, I do not believe I would be justified in entering a decree setting aside this lease. And if you will, prepare a decree along that line.

4679 Mr. Stewart: Will you enter in the record, Mr. Reporter notice of appeal to the Supreme Court.

[fol. 1020] IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

MOTION TO AMEND PETITION—Filed March 15, 1943

Comes Now the plaintiff on behalf of himself and all other members of the Woodmen of the World Life Insurance Society, and moves the court to enter an order allowing the plaintiff to amend his petition by inserting after the word "thereto" in line 7 of the prayer the following:

"That in the event only that the court determines that the officers and directors of the Society had the right to enter into a lease of the radio station to defendant Radio Station WOW, Inc., the court then require as a condition to its approval of the aforesaid lease that it be modified to protect and safeguard the interests of the Society and its members (a) by increasing the rent to 75 per cent of the net income of defend-
[fol. 1021] ant Radio Station WOW, Inc. from said station before income taxes, or to such other amount as the court may find is reasonable, (b) by providing that defendant Radio Station WOW, Inc. shall not pay out or distribute any of its capital except in the event it is required for disbursements in connection with the operation of said station, (c) by requiring defendant Radio Station WOW, Inc. to retain at least 80 per cent of its net income after payment of income taxes until the lease rental for the entire term of the lease is paid, (d) by eliminating from said lease the provision giving defendant Radio Station WOW, Inc. the option to terminate the lease in the event the license to operate the station is cancelled, (e) by eliminating from said lease the provision giving defendant Radio Station WOW, Inc. the option to terminate the lease in the event the station is taken over by the Government, (f) by requiring defendant Radio Station WOW, Inc. to return immediately to defendant Society each of the uncollected accounts receivable which were transferred to it by the Society and to pay to the Society the amount of such account which it has collected, and (g) by requiring defendant Gillin to pay to defendant Radio Station WOW, Inc. the sum of $24,500.00 as additional pur-

chase price of the 250 shares of "B" preferred stock issued to him by said company."

Homer H. Johnson, Plaintiff, by Stewart, Stewart & Whitworth, Ralph Slocum, His Attorneys.

[File endorsement omitted.]

IN THE DISTRICT COURT OF DOUGLAS COUNTY

Doc. 370. No. 111

RESISTANCE OF THE DEFENDANTS WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, A CORPORATION, DE E. BRADSHAW, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER AND STERLING C. HOLSTON, TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS PETITION—Filed March 15, 1943

[Title omitted]

[fol. 1022] The defendants Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston, file this their resistance to the motion of the plaintiff for leave to amend his petition, and in support thereof allege:

1. The Court has heretofore entered its judgment for these defendants and all of the defendants in this cause and each of them, and on March 9, 1943, announced in its opinion from the Bench:

> "In the first place I do not think there is fraud here. There isn't any evidence of any fraud.
>
> "I do not think that the charges made with reference to the public service company have been substantiated. There has not been any evidence at all on that.
>
> "Now, taking into account those facts, I do not believe I would be justified in entering a decree setting aside this lease."

and settlement of the form of the decree was thereupon set for hearing before the Court for March 15, 1943, at 2:00 P. M.

2. There was no material variance between the allegations of these defendants' answer and their proof in support thereof, nor did the plaintiff or his counsel at the trial of this cause make any such claim, nor does the plaintiff or his counsel now make any such claim.

3. The amendment should not be permitted in the exercise of the discretion of the Court, for the reason that the proposed amendments do not constitute, nor refer to, nor undertake to amend the allegations of the petition, and only refer to the amendments of the prayer for general relief.

4. The amendments should not be permitted, for the reason that they do not add any new issue to the causes of action not heretofore pled and determined adversely to the plaintiff.

[fol. 1023] 5. The amendments should not be permitted, for the reason that they would adversely affect the substantial rights of these defendants.

Rainey T. Wells, Brown, Crossman, West, Barton & Fitch, by Ramond M. Crossman, Attorneys for the defendants Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston.

[File endorsement omitted.]

IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

RESISTANCE OF DEFENDANTS RADIO STATION WOW, INC., AND JOHN J. GILLIN, JR. TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND HIS PETITION—Filed March 15, 1943

The defendants, Radio Station WOW, Inc. and John J. Gillin, Jr. file this their resistance to the motion of the plaintiff for leave to amend his petition, and in support thereof allege:

1. The Court has heretofore entered its judgment for these defendants and all of the defendants in this cause and

each of them, on March 9, 1943, announced in its opinion from the Bench:

> "In the first place I do not think there is fraud here. There isn't any evidence of any fraud.
>
> [fol. 1024] "I do not think the charges made with reference to the public service company have been substantiated. There has not been any evidence at all on that.
>
> "Now, taking into account those facts, I do not believe I would be justified in entering a decree setting aside this lease."

and settlement of the form of the decree was thereupon set for hearing before the Court for March 15, 1943, at 2:00 o'clock P. M.

2. There was no material variance between the allegations of these defendants answer and their proof in support thereof, nor did the plaintiff nor his counsel at the trial of this cause make any such claim, nor does the plaintiff nor his counsel now make any such claim.

3. The amendments should not be permitted in the exercise of discretion of the Court for the reason that the proposed amendments do not constitute an amendment to any of the allegations of the petition but relate solely to the prayer thereof, and that the relief sought by said amendments cannot be granted, under the allegations plaed in the petition.

4. That the amendments should not be permitted for the reason that they do not add any issue to the cause heretofore determined adversely to the plaintiff.

5. The amendments should not be permitted for the reason that it would adversely affect the substantial rights of these defendants.

6. The amendment should not be permitted for the reason that a Court of Equity is without power to grant the relief sought by said amendments in the absence of a finding of fraud on the part of the Officers and Directors of the defendant, Woodman of the World Life Insurance Society and a collusion therein by these moving defendants.

[fol. 1025] 7. The amendments should not be permitted for the reason that no claim is made that the lease as executed fails in any respect to reflect the minds of the contracting parties thereto.

Radio Station WOW, Inc., and John J. Gillin, Jr., by Paul P. Massey, Their Attorney.

[File endorsement omitted.]

In District Court of Douglas County

370-111

Homer H. Johnson, Plaintiff,

vs.

Radio Station WOW, Inc., Woodmen of The World Life Insurance Society, a Corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., Defendants

Decree—March 15, 1943

This cause came on for trial on the 1st day of March, 1943, upon plaintiff's petition, the separate answer of Radio Station WOW, Inc., et al., the separate answer of Woodmen of the World Life Insurance Society, et al., and plaintiff's reply, the several defendants being represented by their respective counsel of record, and the individual defendants De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., being personally present in Court. Evidence was continued from day to day until the 9th day of March, 1943, at which time the evidence was completed [fol. 1026] and after the argument of respective counsel the cause submitted.

1. Upon consideration of which the court finds that the plaintiff has failed to establish a cause of action against the defendants or any of them.

2. The court further specifically finds that the plaintiff has failed to establish that the individual defendants, Brad-

shaw as President, Patterson as Vice President, Newberry as Secretary, Ruess as Chairman of Auditors, Braden as Auditor, Miller as Treasurer, Holston as Escort, each and all of said defendants being members of the Board of Directors of Woodmen of the World Life Insurance Society, dominated and controlled the management and affairs of said Society in the lease of Radio Station WOW; that the lease of Radio Station WOW by said Society was fairly and fully considered by the Board of Directors of said Society; that said defendants as members of the Board of Directors of the Society, and the entire Board of Directors of the Society, in the exercise of their discretion determined that said lease should be made; that the evidence fails to establish that any of the individual defendants, officers and Directors of said Society, to-wit: Bradshaw, Patterson, Newberry, Ruess, Braden, Miller and Holston, devised any plan to unlawfully procure personal benefit or profit to themselves, their friends or associates, or did receive directly or indirectly, any personal benefit or profit to themselves whatsoever, in the lease of said Radio Station WOW and the Court so finds; that under all the circumstances as established by the evidence the Society has and will receive under the terms of said lease a fair and reasonable compensation and consideration for the lease of said Radio Station; that said lease of said Radio Station WOW was within the discretion of the Board of Directors of said Society, which discretion was properly exercised, and fur- [fol. 1027] ther within the provisions of the statutes of the State of Nebraska, the Articles of Incorporation and the Constitution, laws and By-Laws of the Society, and was made by the Board of Directors of the Society in good faith within their reasonable discretion and believed by them to be for the best interests of the Society and its members.

The court further finds that there is no evidence that defendant Radio Station WOW, Inc., and its stockholders, directors and officers are dominated and controlled by the officers and directors of the defendant Woodmen of the World Life Insurance Society.

The Court further finds that the defendant Radio Station WOW, Inc. and its stockholders, directors and officers are not dominated and controlled by or in behalf of those who are interested in the sale of the Omaha power facilities to Consumers Public Power District of Nebraska.

The Court further finds that the plaintiff's action should be dismissed.

It Is Therefore, Ordered, Adjudged and Decreed, that plaintiff's action be and the same is hereby dismissed, and that defendants, and each of them, recover of the plaintiff their costs herein expended.

Dated this 15th day of March, 1943.

By the Court, John A. Rine, Judge.

[fol. 1028] In the District Court of Douglas County

[Title omitted]

Motion for New Trial—Filed March 17, 1943

Comes now the plaintiff, on behalf of himself and all other members of the Woodmen of The World Life Insurance Society, and moves the court to grant plaintiff a new trial for each of the following reasons materially affecting the substantial rights of the plaintiff:

1. The decree and judgment of the court is not sustained by sufficient evidence.

2. The decree and judgment of the court is contrary to the evidence.

3. The decree and judgment of the court is contrary to law.

4. For errors of law occurring at the trial and duly excepted to by plaintiff.

5. For irregularities in the proceedings by which plaintiff was prevented from having a fair trial.

6. The court erred in excluding testimony offered by plaintiff.

7. The court erred in admitting evidence offered by the defendant over the objection of the plaintiff.

8. Abuse of discretion by the trial court which prevented plaintiff from having a fair trial.

9. The court erred in finding against the plaintiff and in favor of the defendants.

10. The court erred in not entering judgment for plaintiff and against the defendants.

[fol. 1029] 11. The court erred in finding that the plaintiff failed to establish that the individual defendants who were members of the Board of Directors of defendant Society dominated and controlled the management and affairs of said Society in the lease of its radio station.

12. The court erred in finding that the lease by defendant Society of its radio station was fairly and fully considered by its Board of Directors.

13. The court erred in finding that members of the Board of Directors of defendant Society, in the exercise of their discretion, determined that the lease of the Society's radio station should be made.

14. The court erred in finding that the evidence failed to establish that any of the individual defendants who were officers and directors of defendant Society devised any plan to unlawfully procure personal benefit or profit to themselves or friends or associates, or would receive directly or indirectly any personal benefit or profit to themselves in the lease of the defendant Society's radio station.

15. The court erred in finding that under all the circumstances, as established by the evidence, the Society had and would receive, under the terms of the lease of its radio station, a fair and reasonable compensation and consideration therefor.

16. The court erred in finding that the lease of defendant Society's radio station was within the discretion of its Board of Directors, and that such discretion was properly exercised.

17. The court erred in finding that the lease of defendant Society's radio station was within the provisions of the statutes of Nebraska, the articles of incorporation and the [fol. 1030] constitution, laws and by-laws of defendant Society.

18. The court erred in finding that the lease of defendant Society's radio station was made by its Board of Directors in good faith within their reasonable discretion and believed by them to be for the best interests of the Society and its members.

19. The court erred in finding that there was no evidence that defendant Radio Station WOW, Inc. and its stock-

holders, directors and officers were dominated and controlled by officers and directors of defendant Society.

20. The court erred in finding that defendant Radio Station WOW, Inc., and its stockholders, directors and officers were not dominated and controlled by or in behalf of those who are interested in the sale of the Omaha Power facilities to Consumers Public Power District of Nebraska.

21. The court erred in finding that plaintiff's action should be dismissed.

22. The court erred in refusing to cancel the lease of defendant Society's radio station.

23. The court erred in refusing to require the defendants, as a condition to its approval of the lease of defendant Society's radio station, that it be modified to protect and safeguard the interests of the Society and its members, as set forth in plaintiff's motion filed March 15, 1943.

24. The court erred in dismissing plaintiff's action and ordering that defendants recover from plaintiff their costs.

25. The court erred in not sustaining plaintiff's motion for leave to amend the prayer of its petition, as set forth in motion filed on March 15, 1943, and prior to the entry of the decree and judgment of the court.

[fol. 1031] Homer H. Johnson, Plaintiff, by Ralph Slocum, Stewart, Stewart & Whitworth, His Attorneys.

[File endorsement omitted.]

In District Court of Douglas County

[Title omitted]

Order Overruling Motion for New Trial—April 3, 1943

Now, on this day, this cause comes on for hearing upon motion of plaintiff filed herein March 17, 1943, for a new trial, upon consideration whereof and being fully advised in the premises, it is ordered by the Court that said motion be and the same hereby is ovefruled.

IN DISTRICT COURT OF DOUGLAS COUNTY

ORDER FOR ADJOURNMENT—May 1, 1943

It is hereby ordered that all cases, motions and matters now pending in this Court, and not otherwise disposed of be, and the same are hereby continued until the next Term thereof.

[fol. 1032] This present Term of said District Court was begun on the 1st day of February A. D. 1943, and continued from day to day and from time to time by regular adjournments until this 1st day of May A. D. 1943, at 12:00 o'clock P. M.; and is hereby adjourned Sine Die.

Henry J. Beal, Presiding Judge; Charles Leslie, Jas. M. Fitzgerald, Willis G. Sears, Arthur C. Thomsen, W. A. Day, Frank Dineen, John A. Rine, Herbert Rhoades, Judges.

IN DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

ORDER EXTENDING TIME TO PREPARE BILL OF EXCEPTIONS—June 9, 1943

Upon application of the Plaintiff for additional time in which to prepare and serve a Bill of Exceptions herein, and upon showing of due diligence:

It is ordered that Plaintiff be and hereby is allowed until July 19, 1943, to prepare and serve a Bill of Exceptions.

Dated June 9, 1943.

By the Court, John A. Rine, Judge.

[fol. 1033] IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed April 10, 1943

Notice is hereby given that the plaintiff intends to prosecute an appeal from the decree entered in the above en-

titled case and from the order overruling plaintiff's motion for a new trial.

Signed and dated April 9, 1943.

Homer H. Johnson, Plaintiff, by Ralph Slocum and Stewart, Stewart & Whitworth, His Attorneys.

[File endorsement omitted.]

[fols. 1034-1035] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1036-1050] IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

[Title omitted]

NOTICE OF APPEAL—Filed April 10, 1943

[fol. 1051] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

General Number 31685

ADDITIONAL TRANSCRIPT OF RECORD RELATING TO RULING ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE PRAYER OF HIS PETITION—Filed Nov. 1, 1943

Comes now Homer H. Johnson, appellant in the above entitled case and files herewith the transcript of record certified by Sidney M. Smith, Court Reporter, in the above entitled action relating to the ruling of the trial court on plaintiff's motion for leave to amend the prayer of his petition.

Homer H. Johnson, Plaintiff and Appellant. By Stewart, Stewart & Whitworth, Ralph Slocum, His Attorneys.

[fol. 1052] IN THE DISTRICT COURT OF DOUGLAS COUNTY

PROCEEDINGS IN PART HAD MARCH 15, 1943, ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND PRAYER OF PLAINTIFF'S PETITION

Mr. Crossman: Are you filing this motion or do you purport to file it as a matter of right?

Mr. Stewart: Yes; that is right.

Mr. Crossman: Or are you asking leave of court to permit you to file it?

Mr. Stewart: No; we file the motion, as I understand it, as a matter of right, and I am now presenting the reasons why I think the motion should be sustained. The court said we would treat it as actually filed. The only reason it has not been filed is because the bailiff isn't here.

* * * * * * *

Mr. Crossman: You mean after judgment you can come in and ask to file a motion like this?

Mr. Stewart: Well, judgment hasn't been entered. The court stated his view on certain points in the case. I did not understand any order had been entered. The court refused to enter any order because he said the decree should be presented and I should be given an opportunity to examine it.

Mr. Wells: The court announced his decree, announced it completely. Now, if you had come in here at the end of the evidence but to wait until the court has announced his decision, I never heard of anything like that. It changes the whole business.

[fol. 1053] Mr. Stewart: Because of the position the defendants have taken, I would like an opportunity to go down and file the motion so it will be actually filed, if I may have the original motion.

The Court: You may do that but I am not granting leave to file the motion.

(Short recess taken—Mr. Stewart withdrew to file motion.)

* * * * * * *

Mr. Stewart: During the recess which the court gave I filed the original motion for leave to amend the prayer of the plaintiff's petition. I did not file it before hearing al-

though I furnished copies to the opposing attorneys: I did not file it at the beginning of the hearing because of the statement we could proceed as though the motion had been filed. I did not ask leave of court to file it; I thought it proper to be filed as a matter of right. I now without repeating in detail, ask the court to consider all I have heretofore said to be the reasons why the motion which I have filed for leave to amend the prayer of the petition should be granted. I can understand that the court might not believe that the lease should be modified as requested by the plaintiff in the proposed amendment to the prayer of his petition, but I do not believe the court will deny the plaintiff the right to ask to make such amendment to the prayer of his petition. It seems to me that that motion should be sustained regardless of whether the court later should decide that the lease should be modified or not.

(Argument by Mr. Massey.)

The Court: This is all on the same subject we have all gone over before; it takes a lot of my time here.

Mr. Massey: It takes our time too. It is the flop of the chicken that has just had its head cut off.

[fol. 1054] Mr. Stewart: I am not asking for the modification of the lease—I am asking the court to permit the amendment to the prayer of the petition.

The Court: If there is anything to justify it—can you change the issues?

Mr. Stewart: It isn't a matter of changing the issues; it is a matter of asking the court to permit the prayer of the petition to be amended to include matters that are already in evidence.

The Court: There is no change in there; not a thing has been changed; these things were argued before.

Mr. Stewart: This point was argued before. I want to amend the prayer regarding those things which—(interrupted).

The Court: No; I am not going to.

Mr. Stewart: The court is going to deny the right to amend the prayer?

The Court: Everything is in the record; it will show for itself.

Mr. Crossman: Your honor denies the motion?

The Court: I deny the motion. I am not striking it out; it will stay in the record as it is.

(Form of decree discussed by counsel) followed by:

Mr. Stewart: To get this matter straightened out for sure on plaintiff's leave to amend, as I understand, the court is not granting leave to amend the prayer of the petition because the matters contained in that amendment had already been considered and passed upon by the court when the court announced its decision at the conclusion of the argument?

The Court: That is one reason; that is not the only reason. I am not going to rehash the whole thing over again; it would take too long and I want to get through with this decree.

[fols. 1055-1057] Mr. Massey: There is another more cogent reason: this court is without power.

The Court: If something developes to change my opinion I would do that, but it hasn't happened. It is the same thing over again.

Mr. Massey: Then the motion for leave to amend stands overruled?

The Court: It hasn't come in here yet. They come in here and ask it but I haven't given any leave to come in.

Mr. Massey: There is no leave granted to make this amendment then?

The Court: No.

[fols. 1058-1059] SUPREME COURT OF NEBRASKA, JANUARY TERM, A. D., 1944

No. 31685

HOMER H. JOHNSON, Appellant,

v.

RADIO STATION WOW, INC., et al., Appellees

Appeal from the District Court of Douglas County

JUDGMENT—March 10, 1944

This cause coming on to be heard upon appeal from the district court of Douglas county, was argued by counsel and submitted to the court; upon due consideration whereof,

the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, reversed and cause is remanded, with directions that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside; that the $25,000 of accounts turned over by the society to lessee be returned; that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the lease; that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning the same to the society pursuant hereto are to be paid by the lessee. It is further ordered and adjudged that all costs, both in this court and in the district court shall be paid by the defendants, except the Woodmen of the World Life Insurance Society, costs in this court being taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 1060] IN SUPREME COURT OF NEBRASKA

31685

JOHNSON

v.

RADIO STATION WOW, INC.

OPINION—Filed March 10, 1944

1. The directors of a corporation have no authority to make or authorize contracts or do other acts which are beyond the powers conferred upon the corporation by its charter.

2. The wisdom and expediency of corporate business policies and the methods of executing them are left to the

discretion and decision of the board of directors. In the absence of usurpation, fraud, gross negligence or transgression of statutory limitations, courts of equity will not interfere, at the suit of dissatisfied stockholders, merely to overrule the discretion of directors on questions of corporate management, policy or business.

3. Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraudfeasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.

4. A general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction.

[fol. 1061] 5. Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud.

6. In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction.

[fol. 1062] Heard before Paine, Carter, Messmore, Yeager, Chappell and Wenke, J. J., and Ellis, District Judge.

WENKE, J.:

This action was commenced in the district court for Douglas county by Homer H. Johnson, as plaintiff, on behalf of himself and all other members of the Woodmen of the World Life Insurance Society, against Radio Station WOW, Inc., the Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, and John J. Gillin, Jr.,

as defendants, to have the lease and assignment of license by the society of its radio station to Radio Station WOW, Inc., be declared illegal and void and that they be canceled and terminated and that the society be enjoined from transferring by lease, assignment or otherwise radio station WOW or its license thereto and that the officers of the society be required to pay to the society all expenses incurred in connection therewith. From a finding for the defendants and against the plaintiff and dismissing the plaintiff's action and the overruling of plaintiff's motion for a new trial, the plaintiff has appealed.

For the purpose of this appeal the appellant will be referred to as the plaintiff; the defendant Radio Station WOW, Inc., as the lessee, the Woodmen of the World Life Insurance Society, a corporation, as the society; De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Sterling C. Holston collectively as the officers and directors of the society; and John J. Gillin, Jr., as Gillin.

The first question presented by this appeal is whether the board of directors of the society had the power to authorize the execution of the lease to the radio station. Section 44-1201 Comp. St. 1929, provides in part as follows: "Any such society shall be deemed to have a representative form of government when it shall provide in [fol. 1063] its constitution and laws for supreme legislative or governing body composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws: * * *." Section 1, art. V. of the Amended and Substituted Articles of Incorporation, provides: "The Sovereign Camp shall be the supreme representative governing body and shall be composed of its elective officers, members of elective committees, who are ex officio delegates thereto and such other delegates as are now elected or as shall hereafter be provided for and elected pursuant to the provisions of its Constitution, Laws and By-Laws." Article VI thereof provides in part as follows: "The Board of Directors shall have the general control and management of the business affairs of this corporation and all matters, except during the sessions of the Sovereign Camp." Section 2 of the Constitution, Laws and By-Laws as amended

in 1941 provides: "The Sovereign Camp shall have original and appellate jurisdiction in all matters pertaining to the general welfare of this Society. * * * and shall have generally such powers and may perform such duties as it may deem wise for the welfare of the Society, * * *." It further provides in section 26 (a): "All power and authority of the Sovereign Camp, when not in session, shall be vested in the Board of Directors, except as herein provided." And in section 26 (c): "It shall examine the transactions and reports of its officers and transact any business that cannot be delayed until a meeting of the Sovereign Camp." Article IV of the Amended and Substituted Articles of Incorporation provides: "It may also purchase, erect, equip, furnish, maintain and operate radio stations; * * * 6." Section 3 of the Constitution, Laws and By-Laws as amended in 1941 provides: "The objects of this Society shall be * * * own, maintain and operate radio broadcasting stations; * * *." While it is true, [fol. 1064] as stated in 2 Fletcher, Cyclopedia Corporations (Perm. Ed) 399, sec. 511: "* * * the directors of a corporation have no authority to make or authorize contracts or do other acts which are beyond the powers conferred upon the corporation by its charter." However, tested by the provisions of the statute, the Articles of Incorporation and the Constitution, Laws and By-Laws of the Society, we determine that the board of directors had the power and authority to enter into and authorize the execution of the 15-year lease of its radio station.

The next question is, should a court of equity modify the lease? After the conclusion of the trial the plaintiff moved to amend the prayer of his petition by including therein conditions for modification of the lease. It is contended by the society, its officers and directors, lessee, and Gillin that this motion was never ruled on and therefore not properly here for consideration. In Davey v. Aevermann, 110 Neb. 62, 192 N. W. 956, we held: "This court will not review an alleged ruling of the district court where the record brought to this court fails to disclose that such ruling was, in fact, made by the trial court." The prayer of plaintiff's petition includes the following: * * * and for such other, further and different relief as equity and justice may require." If we were inclined to consider the question of modification this part of the prayer

would be broad enough to permit us to do so. However, as stated in 19 C. J. S. 83, sec. 743: "Within the limits of their authority directors or trustees possess full discretionary power, and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts at the instance of a stockholder, * * * in the absence of usurpation, of fraud, or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority of stockholders, merely to overrule and control the discretion of directors on questions of corporate management, policy, or business." And as stated [fol. 1065] in Royal Highlanders v. Wiseman, 140 Neb. 28, 299 N. W. 459: "The accepted principle is that the wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors. In the absence of usurpation, or fraud, or gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy or business." To like effect are McQuillen v. National Cash Register Co., 112 Fed. 2d 877; Wight v. Heublein, 238 Fed. 321; City Bank Farmers Trust Co. v. Hewitt Realty Co., 257 N. Y. 62, 177 N. E. 309. Therefore, in the absence of usurpation, fraud, gross negligence or transgression of statutory limitations this court will not interfere with the discretionary powers of directors on questions of corporate management, policy or business.

The next question is, did the officers and directors of the society in making the lease so violate their duties to the society that the lease will have to be canceled? The nature of their relationship is well summarized in Beaumont v. Folsom, 136 Neb. 235, 285 N. W. 547: "Directors occupy, of course, a fiduciary relation to the corporation and its stockholders. Howell v. Poff, 122 Neb. 793, 241 N. W. 548. They must exercise the utmost good faith in any transaction touching their duties to the corporation and its property. 3 Fletcher, Cyclopedia Corporations (Perm. Ed.) sec. 850. Conduct tinged with any breach of faith or inconsistent with any duty will be readily condemned. Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839. Dealings with respect to corporate property will be given most careful scrutiny. Gorder v. Plattsmouth Canning Co.,

36 Neb. 548, 54 N. W. 830." And as stated in Whaley v. Matthews, 134 Neb. 875, 280 N. W. 159: " 'Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.' First Trust Co. v. Carlsen, 129 Neb. 118, 261 N. W. 333."

[fol. 1066] In considering the facts in this case we will, of course, follow the rule as stated in Ericson v. Nebraska-Iowa Farm Investment Co., 134 Neb. 391, 278 N. W. 841: "In the determination of appeals in equity, this court will 'reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.' Comp. St. 1929, sec. 20-1925."

The Woodmen of the World Life Insurance Society is a fraternal insurance society organized in 1891 with its headquarters located in Omaha, Nebraska. At about the time of the lease here involved it had approximately $136,000,000 of assets, $370,000,000 of insurance in force, 335,000 members, and its gross annual income was in the neighborhood of $16,000,000 per year. The members of its board of directors and its officers, who are also members of the board, at the time were De E. Bradshaw, president; T. E. Patterson, vice-president; Farrar Newberry, secretary; William Ruess, chairman of auditors; W. C. Braden, auditor; R. E. Miller, treasurer; Sterling C. Holston, escort; all of Omaha who are the resident officers and directors named as defendants. Also H. E. Klugh of Harrisburg, Pa., Robert G. Plunkett of Macon, Ga., William E. Mooney of Chicago, Ill., Charles A. Hines of Greensboro, N. C., Rev. W. M. Crawford of Birmingham, Ala., T. A. Heise of Columbia, S. C., and John J. Wahl of San Antonio, Tex., who are the nonresident members. In 1923 the society obtained a license to operate radio station WOAW which subsequently became station WOW. During the years of 1923 to 1928, inclusive, the station operated at a loss. While a profit is shown for the years of 1929 to 1935, this is discounted by the fact that all charges were not made to the station that properly should have been such as space occupied, salary for time of officers required, wages for time of employees of the society, etc., so that it can be

said that up until 1936, when the society changed its loca-
[fol. 1067] tion and new equipment was added and a better wave length was obtained with more power, that the station operated at a loss. During the years 1936 to 1942, inclusive, the station made a substantial return to the company. During this time there was charged to it salary for the officers time used, which in 1942 amounted to $35,000, also for the space occupied which was at the same rate as provided in the lease to lessee. After deducting all expenses from gross income, including that charged for the officers' time and rent for space occupied, the following net was left from the operation of the station:

1936	$131,337.34
1937	204,631.31
1938	174,169.14
1939	170,653.57
1940	182,032.52
1941	212,807.38
1942	287,437.74

or a yearly average of $194,724.14. The record further discloses that the gross income for January and February of 1943 was in excess of that for the same months in 1942. While the first evidence of any action with reference to a disposition of the station appears in the minutes of the meeting of the board of directors on October 30, 1937, nothing further appears until the action of March 5, 1942; however, the record does disclose that it was often discussed among the officers and directors. Members of the board give as some of their reasons for wanting to dispose of the station the following: That the station interfered with the officers in the discharge of their duties to the society which was organized for the purpose of fraternal insurance; the possibility of its (the radio station) income [fol. 1068] being made subject to income tax; the possibility of its operation causing a tax to be levied on the gross income of the society; the possibility of legislation preventing a fraternal insurance society from owning and operating a radio station; that the society was drawn into controversial subjects discussed over the station; that it caused difficulties in the relationship between employees of the society and the station due to the differences in wage scale; fear of regulatory measures of the Federal

Communications Commission destroying the value of the station; because the area covered by the station had been so materially reduced it no longer was of any great value as an advertising medium for the society; because of the additional cost that new developments such as television and frequency modulation would entail; the possibility of government ownership; and that it had reached the peak of its earning powers and there probably would be a decline in its earning capacity.

On March 5, 1942, the board of directors passed a resolution authorizing the president to negotiate and make a sale of the property for the best price obtainable. Thereafter, on August 25, 1942, President Bradshaw made his report to the board. A committee, consisting of directors Charles A. Hines, William E. Mooney, Robert G. Plunkett, and W. C. Braden, was appointed, who, with all the facts before them which were subsequently put in the lease, made their report to the board favorable to a sale or lease or both and tendered a resolution to that effect. This resolution, after all the facts with reference to the lease were presented to the board, was unanimously adopted and President Bradshaw was authorized to negotiate a sale or lease, or lease and sale subject to the lease, of the radio station, property, and assets, other than cash and accounts [fol. 1069] above $25,000, and he and the secretary were authorized to execute all instruments necessary to carry it into effect. Pursuant thereto the lease on the station and also a lease on the space it occupies were entered into, the terms of which are in accordance with those presented to the special committee and the board. The question of making the lease or sale, or both, was left with President Bradshaw and he handled all the negotiations in reference thereto, William Ruess being the only one present at any of the negotiations.

The lessee is a corporation organized for the purpose of operating the station. Its officers, stockholders, and directors are John J. Gillin, Jr., of Omaha, president and general manager of the station, who owns 100 shares of preferred A, 250 preferred B, 350 common; Guy C. Myers of Seattle and New York, vice-president, who owns 250 shares of preferred A and 250 common; M. M. Meyers, Omaha, secretary, who owns 50 shares of preferred A and

50 common; * [M. M. Meyers, Omaha, secretary, who owns 50 shares of preferred A and 50 common;] Harvey E. Milliken, Omaha, treasurer, who owns 50 shares of preferred A and 50 common; Francis P. Matthews, Omaha, who owns 100 shares of preferred A and 100 common; J. J. Isaacson, Omaha, who owns 50 shares of preferred A and 50 common; Thomas J. Wallace, Chicago, Ill., who owns 100 shares of preferred A and 100 common; Robert P. Samardick, Omaha, who owns 50 shares of preferred A and 50 common. All stock is valued at $1 per share, but preferred A and B has a $7 cumulative dividend right, all preferred being subject to retirement by payment of $100 per share and cumulated dividends. Common was sold at $1 per share, preferred A at $99 per share and 250 shares of preferred B was sold to Gillin at $1 per share. It was authorized to do business when $1,000 was subscribed [fol. 1070] and paid in. There is no personal liability on the part of the stockholders. The board of directors has the power to determine the working capital and fix or abolish reserves.

The plaintiff charges that lessee is dominated and controlled by men who have been and now are directly or indirectly connected with the Consumers Public Power District of Nebraska, or are personally interested in its acquisition of the power facilities serving Omaha and vicinity, which facilities are now owned and operated by the Nebraska Power Company, and that the obvious purpose of the leasing is to make the radio station available to Consumers and those interested in its acquisition of these facilities. The evidence discloses that Guy C. Myers, vice-president and stockholder of lessee, is a fiscal agent in the field of financing utilities and had handled the acquisition of all utilities purchased by the Consumers Public Power District of some $47,000,000 in value and was negotiating for Consumers in its endeavor to purchase the properties of Nebraska Power Company for which an offer of $40,600,000 had been made; M. M. Meyers, secretary and director and stockholder of lessee, is a representative of a banking syndicate which had handled all of Consumers bonds and which hoped to handle the bonds of Consumers if

* Matter inclosed in brackets, struck out in copy.

it purchased the property of Nebraska Power Company; Francis P. Matthews, director and stockholder of lessee, is counsel for Consumers in its effort to purchase the properties of Nebraska Power Company; and that John B. Dawson, son-in-law of President Bradshaw, is a member of a New York firm of attorneys who are counsel for the banking syndicate that handles all of Consumers' bonds. That these men have an interest in trying to secure the purchase for Consumers is beyond question but there is no evidence that Consumers has any interest in lessee nor have any of the [fol. 1071] officers and directors of the society any interest in Consumers or lessee nor can Consumers use any of its funds for this purpose. If any of these parties desired time on this station to explain their plan to the public they could purchase it no matter who owns the station and the same amount of time would have to be made available for the other side. It also appears that there is a divergence of opinion among the stockholders of lessee as to the desirability of Consumers acquiring these properties. The record does not sustain this contention of the plaintiff.

The plaintiff further charges that the individual defendants, who are officers of the society, violated their duties as such officers and the trust imposed in them as such by devising a plan to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of radio station WOW for a grossly inadequate consideration. The record discloses that none of the officers and directors of the society have any interest in lessee nor any agreement with any one, by which they have now or may in the future claim any interest therein. None of them have any interest in the purchase of the Nebraska Power Company property by Consumers, either directly or indirectly. In their action to dispose of the operation of the station the several directors gave various reasons as controlling their judgment for so doing. All of these reasons are not supported by evidence in the record but the action of leasing the station being within the scope of their authority the reasons therefor and the desirability thereof are matters for their concern and with which the court will not interfere unless their acts are shown to be fraudulent or the terms thereof so inadequate as to create a situation when it must be said that it would be a legal fraud to permit [fol. 1072] it to stand. Fraud is never presumed but must

be established by whoever alleges it and in examining the record we fail to find any evidence of actual fraud on the part of the officers and directors of the society.

The next question presented by the record is, do the facts create a legal or constructive fraud? "Constructive or legal fraud may be found from the relation of the parties to a transaction, or from circumstances and surroundings under which it takes place. The conscience is not necessarily affected by it, and it may exist without any fraudulent intent. * * * 'Legal fraud' is synonymous with 'constructive fraud,' and is such as is implied by law from the nature of the transaction itself. The question of the existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question, but the law regards the transaction as fraudulent *per se*." Lake Hiawatha Park Ass'n v. Knox County Agricultural Society, 28 Ohio App. 289, 162 N. E. 653. In Taxpayers' League v. Wightman, 139 Neb. 212, 296 N. W. 886, we held: " 'Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.' 26 C. J. 1061." Fraud may be established by circumstantial evidence. "The general rule that fraud is not presumed, but must be proved by the party who alleges it, does not mean that it cannot be otherwise proved than by direct and positive evidence. Fraud in a transaction may be proved by inferences which may reasonably be drawn from intrinsic evidence respecting the transaction itself, such as inadequacy of consideration, or extrinsic circumstances surrounding the transaction. In fact, many of the elements of fraud [fol. 1073] are such as not to be susceptible of proof by direct testimony. Fraud in its nature is not a thing susceptible of ocular observation or readily demonstrable physically; it must, of necessity, be proved in many cases by inferences from the circumstances shown to have been involved in the transaction in question." 24 Am. Jur. 89, sec. 257. "Equity courts are said to be more liberal than the law courts in respect of the circumstances from which an inference of fraud may be drawn, and will grant relief upon the ground of fraud established by cir-

cumstantial evidence which would not always be deemed sufficient evidence to justify a verdict at law." 24 Am. Jur. 128, sec. 282.

During the past seven years the station has netted the society an average annual income of approximately $194,000 in addition to being charged the same rental for the space occupied in the society's building as provided in the lease with lessee and also being charged with part of the salary of the officers of the society, which in 1942 was $35,000. The net for 1942 was approximately $287,000. The average of the 15-year lease will be approximately $74,000 per year. While the rental income for the space occupied in the building that the society will receive remains the same and it will be assumed that the time given by the officers to the station and now available to other functions of the society will be of sufficient value to compensate for the amount of their salary formerly charged to the station, yet, it is difficult to understand why an agreement would be entered into that would so seriously cut down the income of the society. As an explanation of the difference in the value of the income of the station to the society and the same income to a purchaser or lessee is cited the application of federal income taxes thereto. The income while the station is being operated by the society is tax exempt while generally the income to most any purchaser or lessee would be subject to tax in an amount depending [fol. 1074] upon the various factors as they would affect such purchaser or lessee. The radio station is a business different from that of the society generally and the matter of the desirability of the society disposing of it being for the board of directors, since it had the power and authority to do so, we will generally not interfere, unless, we come to the conclusion that to permit the action to stand would work a fraud upon the society. The rule as to inadequacy of consideration, taken from 9 C. J. 1174, and as approved in Price v. Fraser, 119 Neb. 806, 231 N. W. 18, is: "Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself a convincing evidence of fraud." If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but

in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof, for as stated in McGuire v. Stimbert, 129 Neb. 383, 261 N. W. 685: "In the determination of the interests of parties, equity looks through the form and regards the substance of the transaction."

The record discloses that President Bradshaw, who was then general counsel for the society, was instrumental in getting the station for the society in 1923. At first the station was financially unsuccessful. President Bradshaw employed Gillin in 1929 and he seemed to have the ability to operate the station successfully and President Bradshaw felt Gillin was largely responsible for the station's remarkable success. Gillin, however did not at any time become an officer or director of the society. No particular [fol. 1075] effort was made to dispose of the station by either lease or sale until 1942 although the officers and directors testified that they often discussed it. In 1937 there was some action taken by the board but nothing in particular was done in regard thereto. It is also significant to note that President Bradshaw in his reports to the Sovereign Camp of the Society in 1937, 1939 and 1941 reported favorably upon the radio station and that it was a valuable adjunct to the society and to like effect in his semi-annual reports to the board of directors up until 1942, while in his testimony he stated that it had ceased to be such for the past five or six years. There is evidence that Cowles of Des Moines, Ia., made an offer in 1935 and that the World Herald attempted negotiations in 1936 and 1937 but nothing came of these negotiations. However, in March of 1942 the board of directors authorized President Bradshaw to negotiate and make a sale of the property for the best price obtainable. The reasons of the various officers and directors for the desired disposition have already been set forth in this opinion.

President Bradshaw first began his negotiations by contacting Trammell of N. B. C. and trying to interest him in having his company carry a second mortgage on the station of $350,000 subject to a first mortgage of $350,000 to the society. This was at first favorably considered and President Bradshaw then contacted Carl A. Swanson and his two sons, Clarke and Gilbert, all of Omaha, endeavoring to sell them the station for $850,000, $150,000 to be a cash payment and the balance to consist of two mortgages as

above described. The society was to get the proceeds of the second mortgage. When these negotiations fell through because N. B. C. refused to make the loan a lease was discussed, which was to include an option to purchase. This failed to materialize because of the manner in which [fol. 1076] federal income tax regulations would affect the income if a lease included an option to purchase. Negotiations then continued with A. Horace Erickson and Clarke Swanson discussing a sale for $850,000. Erickson and Swanson refused to consider this amount but wanted to offer around $600,000-$650,000 but President Bradshaw would not consider anything under $850,000. A lease was then discussed but when Erickson and Swanson wanted the society to pay for new equipment needed for television and also wanted to move the station, this fell through. It is significant that in all these negotiations President Bradshaw wanted the parties to give Gillin a place in the business. Gillin and President Bradshaw had become very close personal friends and as President Bradshaw testified, Johnny (Gillin) had stayed with him and made the station and he did not want to sell it without Johnny being included and have a share in the business and he was willing to do the best he could to see that he got it. There is also evidence that the purchase of the station was considered by the Security Acceptance Corporation but dropped, and that the World Herald again made efforts to acquire the station but were turned down until the negotiations hereinafter discussed were completed.

When these negotiations with Swanson and his two sons and then Erickson and Swanson fell through, President Bradshaw suggested to Gillin that he organize a group of his friends for this purpose and out of these contacts was created Radio Station WOW, Inc., lessee. Among those contacted by President Bradshaw who became officers and stockholders of lessee are Guy C. Myers, Harvey E. Milliken, M. M. Meyers, and J. J. Isaacson. This corporation, the personnel and stock ownership of which has been set out in this opinion, was formed on October 3, 1942, the same day the lease was entered into. Until the very day lessee was incorporated on October 3, 1942, Gillin was only to [fol. 1077] invest a nominal sum to acquire a one-fourth interest therein of 250 shares of common and 250 shares of preferred B and only when Erickson and Swanson on that date backed down on their agreement to put up $25,000 did

Gillin agree to put up $10,000 for which he received 100 shares of common and 100 shares of preferred A. Matthews then put up $5,000 more and Isaacson and Samardick each came in for $5,000, making the $25,000 which Erickson and Swanson were to have put up.

Let us now examine the lease and the provisions thereof. The cash rentals are $8,166 per month for three years and $5,680 per month for 12 years. It is significant to note that the lease requires no down payment, whereas in all previous negotiations President Bradshaw had made a substantial down payment and a requirement in addition to the lessee having adequate additional financial stability for the future performance thereof. Not only that, but $25,000 of accounts receivable were transferred by the society to lessee so it would have $100,000 with which to do business which President Bradshaw considered a minimum. Bradshaw explains this by saying he felt Gillin was so essential to the station that if he were left in charge the society would be secure. It is also significant that the amount of accounts receivable transferred to lessee is equal to the 250 shares of preferred B stock issued to Gillin for $1 per share whereas all the other incorporators of lessee paid $99 per share for their preferred A stock.

One of the principal provisions of the lease for the benefit of the society is that the lessee is to install all new equipment necessary to keep the station in first-class condition and which at the end of the term of the lease is to be turned over to the society. This is considered very important in view of the probability of television and frequency modulation sometime after the war and the probable high [fol. 1078] cost of such equipment. However, no provision is made in the lease to secure the performance of this part of the lease in the way of reserves by money being kept out of the earnings. The only security is the corporation itself. This expressly provides that none of the stockholders thereof are to be personally liable for its obligations; it also provides that the preferred stock can be redeemed; it can do business on $1,000 capital; its capital structure and reserves are under the control of the board of directors. According to the testimony this new equipment will be very expensive and with the limited funds now available to carry on a business of this kind and with a corporation that can redeem its preferred stock at any time, including Gillin's, there is a little security back of this provision

except the good intentions of the officers and stockholders of the lessee.

The lease further provides that if the station is taken over by the government then the lessee can turn it back and cancel the lease or pay the rent provided in the lease and keep it in force. This provision only protects the lessee in this very important feature for it can either take a profit or turn the station back to the society without incurring any liability in so doing.

Many of the reasons considered by members of the board as making it desirable to dispose of the station contemplated that the society should completely dispose thereof. This lease does not accomplish this for the society remains the owner. It does not protect the society against legislation which prevents fraternal societies from owning radio stations. It in no way protects the society if the license to operate is canceled, except for default of lessee, for the lease is then canceled and the society will own the station without a license to operate it. Under the provisions [fol. 1079] of this lease the society continues to assume the risk of government ownership and the risk of cancellation of the license, which were considered by the directors as important reasons for desiring to dispose of the station.

We have considered the testimony of those witnesses that are experienced in radio and those who are experienced in business matters generally giving their opinion that it was a good deal for the society and that the provisions are adequate, but from our consideration of the entire record we do not agree with their opinions. We find that President Bradshaw, as president of the society and because of his close friendship for Gillin and his desire to secure his future welfare, prompted the organization of lessee by his friends and those of Gillin in order to take over the station. As a result of these negotiations Gillin obtained a one-fourth interest in this 15-year lease on this valuable radio station for a nominal investment and in addition thereto, in effect, a $25,000 bonus from the society. The society in return obtained an extremely excessive reduction in its income therefrom, without a complete disposition thereof, and a lease the terms of which are grossly inadequate to protect it. It is evident, from the record as a whole, that President Bradshaw in his zeal to secure the welfare of his close personal friend Johnny Gillin entered into a lease for the society, which the board of directors author-

ized, the terms of which are grossly inadequate to protect the society and to permit it to remain in force and effect would be a fraud upon the society and the members thereof. It is therefore ordered that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set [fol. 1080] aside.

It is further ordered that the $25,000 of accounts turned over by the society to lessee be returned; that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the leases; that the costs of these proceedings be taxed to the defendants, except the Woodmen of the World Life Insurance Society; that all expenses had by the society in connection with the transfer of the station and license to the lessee and that will be had in connection with returning the same to the society pursuant hereto are to be paid by the lessee.

Reversed, With Directions.

[fol. 1081] DISSENTING OPINION

Yeager and Cappell, JJ., and Ellis, District Judge, Dissenting.

The majority opinion confirms the power and authority of the directors of the Society to make the lease in question and finds no fault with the decision of the directors that it was to the best interests of the Society and its members for it to get out of the radio broadcasting business.

The opinion finds that there was no actual fraud and otherwise disposes of all the contentions of the plaintiff favorably to the defendants with the exception of the contention that "legal" or constructive fraud is established by the record.

With reference to constructive fraud, this contention, along with all the others made by the plaintiff, involved and placed upon him the burden of proving the same by a preponderance of the evidence.

At the plaintiff's rest there was utterly no proof to sustain *any* of plaintiff's allegations. If a motion for judgment had been made at that point, it seems wholly improbable that any trial judge would have hesitated to have sustained such motion and entered judgment of dismissal. However, the defendants expressly refrained from entering such a motion, expressly indicated a desire to completely refute the charges that had been made against them, and then proceeded voluntarily to put in all of the facts and details surrounding the transaction in question.

This attitude on the part of the defendants certainly justifies the inference that they were not conscious of any wrong-doing but rather had a confidence that their action was entirely open and above-board and justified by the circumstances.

With reference to the record itself, there is no direct evidence whatsoever that supports any of the plaintiff's charges. On the other hand, the overwhelming weight of the [fol. 1082] evidence (in nearly all instances uncontradicted) shows the following:

1. The long held judgment of several members of the board of directors of the Society that the radio station was foreign to and not beneficial to the Society. This judgment was unanimous after 1937.

2. The unquestionable threat of taxation proximately caused by and contributed to by the untaxed profits from the station. This was not a threat based on speculation or conjecture alone but was real in the form of legislative proposals and bills and actual suits involving more than $1,000,000. (This threat of tax legislation proximately caused by or contributed to by the profits from the radio station and prejudice to the primary interest and business of the Society was sufficiently real that if the officers and directors had not been prompted to an effort to eliminate this cause they would have been subject to severe criticism on the ground that they failed in the discharge of their duties as trustees to the members of the Society).

3. The peculiar uncertainties, threats and hazards of the broadcasting business.

4. Completely overcomes any inference based on the difference between the income from the Society's operation of the station and the rental under the lease.

5. The return to the Society under the lease appears to be greater than could be realized from outright sale.

6. *Uncontradicted* and overwhelming expert opinion that the rental is adequately compensatory.

7. Completely disproves and overcomes every allegation and insinuation that the officers and directors of the Society had any personal interest in the lessee corporation or stood to profit personally in any way whatsoever from its lease [fol. 1083] and operation of the station.

In this state of the record the majority opinion is left to rest on just two things—(a) Bradshaw's interest in John Gillin and (b) dissatisfaction with the terms of the lease. With reference to the first, the evidence is overwhelming in establishing Gillin's ability, capacity and standing in the radio field.

When Bradshaw's statements are considered with the context of his testimony, they do not support any inference of ulterior purpose but rather disclose a perfectly normal and proper reason for wanting Gillin to be in any organization taking over the station. There is no evidence that the personal relationship between Bradshaw and Gillin was any other or different than that which would exist between any appreciative employer and a valued, competent and loyal employee. Bradshaw's statements about Gillin should be considered not only in the light of his success in operating the station but also in the light of other facts as, for instance, Cowles's testimony that at one time he attempted to persuade Gillin to leave WOW and enter his employ.

It should also be noted that Carl A. Swanson testified he had known Gillin for a long time and wanted to help him if he could. Also, that Gillin was to have a one-fourth interest in the organization if the Swansons made a deal for the station and that the Swansons were to put up the money.

With reference to the dissatisfaction of the majority with some of the terms of the lease, it is interesting to note that Erickson would have insisted under a lease arrangement that the Society pay for the installation of television equipment. And also that the Swansons would not [fol. 1084] have entered into a lease without an option to buy at the termination of the lease for a nominal sum. This evidence serves to illustrate that no lease is likely to contain only those provisions which are to the advantage of one of the parties.

The advantages of the lease under attack over lease containing either one or both of the provisions which other prospective lessees would have insisted on is apparent. Under the lease in question the Society continues to own the reversion unincumbered by any option and with assurance that the physical equipment will be maintained and modernized apace with technical developments in the industry, all of which would seem to enhance the opportunity of the Society to sell the reversion and thus entirely remove the Society from the radio business.

In the final analysis it seems apparent that the finding of constructive fraud by the majority must be and is ultimately based upon an inference of inadequacy of the rental consideration reserved in the lease and this inference must rest *solely* on the difference between the amount of net income received by the Society from its operation of the station and the rent it will receive under the lease. This must necessarily be true because all other phases of the matter such as the decision to lease and terms and conditions of the lease are conceded by the majority to fall within the discretion and wisdom of the directors and are not subject to judicial interference in the absence of fraud. It will be noted that the majority opinion holds with reference to the belated motion of plaintiff for alternative relief requiring modification of the terms of the lease that these matters are within the discretion of the directors and that the court will not interfere.

[fol. 1085] In any comparison of these income figures it must be borne in mind that had it not been for the rare and peculiar exemption of the Society from federal income taxes, the net income of the Society from its operation of the station would have been *very substantially* reduced. It was the advantage of this very exemption over others engaged in the same type of commercial business which aroused prejudice against the general exemption in favor of the Society and other similar institutions and created the threat of legislation to remove the exemption—a threat which at least involved the possibility of injury to the best interests of the members of this Society far beyond the loss of income represented by the difference between the income from the station operated by the Society and the rental.

The record, as well as common knowledge, overwhelmingly indicates the improbability, if not the utter impossi-

bility, of finding either a buyer or a lessee of the station not subject to the burden of federal taxation. Therefore, in comparing the value of the station to the Society on an income basis with the value that might be realized on a sale or rental under a lease, it seems elementary that consideration must be given to the fact that the station could not be comparably profitable to any available buyer or a lessee and that this inescapable fact would be reflected in any bid or rental offer that might be made.

In this situation the plaintiff, having the burden of proof, *offered no direct evidence whatever* that the rental reserved under the lease attacked was inadequate. Neither did the plaintiff offer any evidence as to the fair market value of this station for whatever help much evidence might be in reasoning from such value to any adequate or fair rental. As before stated, there is nothing in the plaintiff's case to support the inference of inadequate rental consideration [fol. 1086] and in turn the constructive fraud inferred therefrom except the difference in income.

Against this, the evidence presented by defendants discloses the following: The matter of this lease was referred to a committee of the board of directors of the Society, the members of which met by themselves, considered the matter for two days with all the facts before it and reported to the whole board recommending the lease. Following this, the whole board unanimously approved the lease. The board is composed of 14 members, several of them from scattered points in the United States, and there is nothing in the record that would justify any other assumption than that all members of the board are conscientious, representative and capable men. In addition to the 14 judgments thus represented, three business men of Omaha who are members of the Society expressed their opinion approving the lease.

Messrs. Carl A. Swanson and Gilbert Swanson, who do not appear to have been interested in the Society and who do not appear to have been engaged in the radio business, but who appear to be successful business men and who made some investigation of the business and the federal tax angle as a result of some negotiations looking either to the purchase or lease of the station, testified that in their opinion the rental under the lease was adequate.

In addition to this evidence, the defendant introduced the testimony of six men, all experienced in the ownership,

management and operation of radio stations in widely separated parts of the country. Among these witnesses were Niles Trammell, president of the National Broadcasting Company, and Joseph H. Ream, vice-president of Columbia Broadcasting System. All of these witnesses with broad background of experience in a highly specialized and limited field testified that the rental value was adequate. [fol. 1087] Several expressed the opinion that the rental was not only adequate "but high" and "more than could be secured by rental to other people in the radio industry."

None of the opinions of 25 men thus reflected by the record was impeached in any way and this evidence stands uncontradicted.

In this state of the record we are unable to agree with the conclusion of the majority that the court is justified in inferring constructive fraud.

Recognizing the importance and value of inferences in the determination of disputed facts and that there are many instances in trials where inferences are permitted to overcome positive and direct testimony, we think the latter is only justified where the strength of the inferences clearly overcomes the opposing evidence or where the force of the inference is irresistible and destroys the very credibility of the direct evidence.

Inferences ought to spring directly, naturally and irresistibly from proved facts. In view of the undisputed impact of federal taxes upon the profits of any operator of the station in question other than one enjoying the exemption of the Society, and the resulting absence of any basis for a rental comparable to the Society's income, it is seriously doubted whether any inference whatever from this difference is justified. The proved fact basis is entirely lacking.

In any event, as stated in 32 C. J. S. 1129, 1133, sec. 1044: "An inference is unjustified and without probative force if it is inconsistent with undisputed or clearly established facts, or is contrary to direct, positive, and uncontradicted testimony. Evidence which is consistent with direct, positive, and otherwise uncontradicted testimony that a fact does not exist will not support an inference that it does, and an inference should not be adopted from a few [fol. 1088] of the facts proved when it is absolutely inconsistent with, and repelled by, other equally well proved facts."

The result of the majority opinion is to place the problem of disposing of the radio station back in the hands of the directors of the Society with their power to sell or lease confirmed and their judgment that it is to the best interests of the Society to get out of the broadcasting business unquestioned.

This will neither enlarge the field of prospects nor change the character of possible buyers or lessees. Neither will it overcome the inexorable economic fact that any purchase price or rental will be reduced in amount to compensate for the effect upon possible profits of federal taxes. If, to escape judicial condemnation, the purchase price or rental must be directly comparable to the basis of profits to the Society, the directors are faced with great difficulty in executing their judgment if not an absolute bar.

No one can say with positive assurance that this Society will sustain benefit or suffer detriment from the condemnation of the lease in question. Absolute assurance of the wisdom of any major business decision, whether made by an individual or corporate agents, is seldom afforded at the time. Hindsight is all too frequently the unpleasant reminder of mistakes in judgment. The result of the judgment following the majority opinion is essentially a decision of a problem of business or economic character and not of legal character. It is a venture into a field in which the courts are obviously without adequate experience or equipment. Such decision is easily rendered and will have the virtue of arbitrary finality. This, however, will not exempt it from the inexorable review of time and future developments. It will not be immune from that same [fol. 1089] hindsight to which all such decisions are subject. Its inherent unsoundness lies in the fact that if time indicates error the maker of the decision is without opportunity or power to move to avoid the consequences. These things are the basis of the rules quoted in the majority opinion from Royal Highlanders v. Wiseman, 140 Neb. 28, 299 N. W. 459, and Price v. Fraser, 119 Neb. 806, 231 N. W. 18.

The risk that the affirmance of this lease would deprive the members of the Society of a chance of better disposition of this property, if present, is insignificant when conpared to the danger to them and all other citizens of the precedent of judicial determination which ignores the overwhelming weight of competent evidence.

We find confirmation of our opinion that the plaintiff wholly failed in sustaining the burden of proof to justify any inference of constructive fraud in the other contention of plaintiff mentioned at the outset. At the close of the case and after the announcement by the trial court that his findings would be against the plaintiff, the latter filed a motion for leave to amend the prayer of his petition. With reference to this the plaintiff says in his brief: "The substance of his proposed amendment was that in the event only that the court determined that the officers and directors of the Society had the right to enter into a lease of the station, the court then require as a condition of its approval, that such lease be modified to protect and safeguard the interests of the Society and its members in certain respects then mentioned." The suggested modifications included a substantial increase in the rental.

This motion seems to clearly disclose recognition by the plaintiff that he had wholly failed to sustain the burden of proof of either actual or constructive fraud and that the [fol. 1090] direct proof to the contrary was overwhelming. Otherwise the plaintiff has suggested no tenable, legal basis upon which this court could rewrite the lease and bind the lessee thereto.

With reference to Mr. Gillin, his interest in the lessee, and the consideration therefor, he was not an officer of the lessor and what interest he has in the lessee, as well as what he paid for it, seems to be a matter between him and his associates and wholly immaterial to the issues involved. He had been a valuable employee of the Society and the lease of the station left no place for him in the Society. We are reluctant on the record to infer an ulterior purpose from what with equal force appears to have been no more than a decent desire to see him satisfactorily placed. The record gives full credit to him for the successful financial operation of the station by the Society during the later years. The evidence of his ability and valuable contacts in the radio field is overwhelming and undisputed. In view of these facts it seems that Bradshaw's apparent interest in having Gillin in the lessee organization was entirely proper since it directly tended to prove assurance of the success of the lessee and therefore the best possible security for performance of the covenants of the lease.

The escape clauses in the lease in case of the station being taken over by the government or cancellation of the license

seems to be no more than sound business provisions which any prudent and experienced business person would insist on with the firm support of his own counsel. It must be borne in mind that the lessee under penalty of forfeiture must keep the station equipment in first class and modern operating condition so that upon its return to the Society in any event the station will be unimpaired from an operating standpoint.

[fols. 1091-1093] The other provisions of the lease, reflecting in this case as they do in every such instrument the composition of efforts of each party to have as many favorable and as few burdensome ones as possible, cannot, we think be said to be either so unusual or improvident as to justify any inference of fraud.

It is our opinion that this record wholly fails to disclose any basis justifying the court in disregarding the rule that in the absence of fraud, "The wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors, • • • ". Royal Highlanders v. Wiseman, 299 N. W. 459, (140 Neb. 28).

[fol. 1094] IN SUPREME COURT OF NEBRASKA

MOTION FOR REHEARING—Filed March 30, 1944

Come now the Appellees: Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Sterling C. Holston, and move the Court to vacate and set aside the judgment and opinion rendered herein and to grant a rehearing of the issues involved, and that upon said rehearing oral argument be granted to these Appellees in respect of said issues, and that the judgment of the District Court dismissing plaintiff's action be affirmed for the following reasons:

I

The order of the Court that

"• • • the transfer of the license to operate the station be vacated and set aside • • • " (Maj. Op. p. 25)

and

"• • • that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose • • •" (Maj. Op. p. 26)

is void and unenforceable for the following reasons:

1. Under the Act of Congress (47 U. S. C. A. Subchapters I to VI inclusive of Chapter 5) creating the Federal Communications Commission and defining its jurisdiction and power, the issuance, assignment, transfer, surrender or revocation of all radio licenses is within the exclusive jurisdiction and power of the Federal Communications Commission.

2. This Court has no jurisdiction or power to require or direct Radio Station WOW, Inc., to assign, surrender, cancel or transfer the radio license now held [fol. 1095] by it for the operation of Radio Station WOW, as jurisdiction over that subject matter is solely and exclusively within the jurisdiction and the power of the Federal Communications Commission.

II

This action is essentially one to annul or set aside an order of the Federal Communications Commission made under the provisions of Title 47, U. S. C. A., Subchapters I to VI inclusive of Chapter 5, and neither the District Court nor this Court ever acquired jurisdiction over the subject of this action.

III

This Court has no jurisdiction or power to decree that the lessee, Radio Station WOW, Inc., surrender or assign the radio license issued to it by the Federal Communications Commission, nor to require the Federal Communications Commission to consent to the assignment thereof to the Society, nor to require the Federal Communications Commission to issue a new radio license to the Society, nor to deprive the lessee of the continued use of its radio license.

IV

This Court being without jurisdiction or power to require the return of the radio license to the Society, the effect of the majority opinion of the Court is to revest the possession

of the broadcasting equipment in the Society without a radio license to operate a radio station, leaving Radio Station WOW, Inc. with a radio license but without broadcasting equipment to enable it to operate a radio station.

V

The judgment and opinion of this Court vacating and setting aside the transfer of the license to operate the Radio Station and ordering that the license to operate the Radio Station be returned to the Society and directing the lessee [fol. 1096] to do all things necessary for that purpose is void and unenforceable and contravenes and is repugnant to the Commerce clause of Section 8 of Article I of the Constitution of the United States and to Acts of the Congress of the United States, being the Communications Act of 1934 and amendments thereto, Subchapters I to VI, inclusive, of Chapter 5 of Title 47 of United States Code Annotated, in that exclusive jurisdiction over all the channels of interstate and foreign radio transmission and the use of such channels is vested in the United States, its Federal Communications Commission and its Courts.

VI

Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deprive these appellees, and each of them, of their liberty and property without due process of law, and in that they deny to them, and each of them, the equal protection of the laws.

VII

Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 3 of Article I of the Constitution of the State of Nebraska, in that they deprive these Appellees, and each of them, of their liberty and property without due process of law.

VIII

The majority opinion, in effect, is tantamount to a mandate to the Society to resume and continue the operation of the Radio Station, notwithstanding the reasoned judgment of its Board of Directors is that the continued opera-

tion of the Radio Station places in jeopardy the Society's tax-exempt status with respect to its entire assets and income under both State and Federal laws and regulations, which presents an economic hazard to the welfare of the Society which is not and cannot be offset by any profit heretofore realized or to be hereafter realized in the operation of the Radio Station.

[fol. 1097] IX

The opinion and judgment of the Court specifically found that there was a total and complete absence of any actual fraud.

The decision of the Court is based solely upon constructive fraud which was not an issue in the District Court, which was, therefore, not argued in this Court, and this Court has not had the benefit of the presentation of that issue.

The plaintiff is not entitled to a decree upon the principle of constructive fraud, for the reason that the only allegations of the petition are of actual fraud, which this Court found was not present in this transaction.

X

The opinion of the Court wholly misconceives the conditions, facts, circumstances and motives which prompted the Board of Directors of the Society to authorize and to enter into the lease of the Radio Station.

XI

The Court erred in a finding of constructive fraud based upon:

1. An alleged loss of revenue to the Society based upon speculative future earnings.

2. An assumed inadequacy of consideration and an alleged inadequate rental.

3. The relations between Mr. Bradshaw and Mr. Gillin; an alleged inadequate consideration contributed by Mr. Gillin for his interest in the lessee corporation; and the Court's assumption that the $25,000 of accounts receivable were donated to Mr. Gillin, whereas said accounts were in fact transferred to lessee as a

part of the leasehold estate and repayment thereof is provided in the lease rental.

4. Mr. Bradshaw's favorable reports to the Society [fol. 1098] concerning the Radio Station, which reports point out the hazards to the Society in the operation of the Radio Station.

5. The fact that the lease requires no down payment and the absence of a requirement in the lease that the lessee set aside reserves to guarantee performance of lessee's obligations under the lease.

6. The provision of the lease giving lessee the option to cancel in the event the Radio Station is taken over by the government.

7. The fact that title to the fee of the property remains in the lessor and the hazards of unfavorable legislation or government ownership have not been removed.

8. The fact that the Society is not protected in the cancellation of the license not due to the default of the lessee.

9. An assumption that a sale of the Station could have been made for an adequate consideration and the risk of cancellation of the license or government ownership thereby avoided.

XII

The Court erred in the inferences drawn and the construction placed upon the conditions, facts and circumstances leading to the execution of the lease.

XIII

The statement in the opinion:

"• • • It is evident, from the record as a whole, that President Bradshaw in his zeal to secure the welfare of his close personal friend Johnny Gillin entered into a lease for the Society, which the Board of Directors authorized. • • •" (Maj. Op. p. 25)

[fol. 1099] wholly ignores the admitted fact that every term of this lease was carefully investigated and considered

by a special Committee of four lawyer members of the Board of Directors of the Society, submitted to the entire fourteen members of the Board of Directors of the Society, and that the Board of Directors of the Society after long study and investigation unanimously and in good faith approved and authorized the execution of the lease; and in this connection the Court erroneously substituted its opinion for the opinion and judgment of the Board of Directors.

XIV

The Court acting in a judicial capacity substituted its opinion for the uncontroverted testimony and opinion of men of wide experience in the radio field and in business generally on the question of the adequacy of the provisions of the lease and the consideration therefor.

XV

The Court ignores the protective and controlling provisions of the lease specifically included as an added protection to the Society during the entire fifteen-year term of the lease, particularly the conditions imposed upon the lessee:

1. To maintain all leased property.

2. To purchase and install at its own expense all necessary new equipment to carry on the radio business as it now exists, or may hereafter be improved, or as required to enable the lessee to conform to the rules of the United States Government as they now exist or may hereafter be required.

3. To pay all taxes of every character upon the leased property and the income of the lessee.

4. To keep in effect all insurance at its own expense.

5. Upon the termination of the lease, to return the possession of all of the leased property, including substitutions, replacements and additions.

[fols. 1100-1102] 6. To assign all then contracts of the lessee for the broadcasting of commercial programs, without additional consideration.

7. In the event of default of the payment of rent and the continuance for thirty days, to transfer all of the leased property and accounts to the Society.

8. Not to pay any salary in excess of $250.00 a month, or any traveling expense in excess of $100.00 at any time that rent under the lease is in default.

9. To keep a true record of all contracts, receipts and disbursements.

10. To deposit all moneys in a bank mutually agreed upon.

11. To pay all bills by check, and

12. Granting to the Society the right to examine the books and accounts of the lessee at any time it deems advisable.

XVI.

The opinion and judgment of the Court ignores the most outstanding assurance of the maintenance of the financial security of the lessee, which is the continuance of the nationally recognized and established ability of Mr. Gillin in radio station management.

XVII

The evidence is insufficient to sustain the finding and judgment of this Court.

Respectfully submitted, Rainey T. Wells, Peterson & Devoe, Brown, Crossman, West, Barton, & Fitch, Attorneys for Appellees Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Sterling C. Holston.

[fols. 1103-1105] IN SUPREME COURT OF NEBRASKA

MOTION TO DISMISS PLAINTIFF'S PETITION—Filed March 30, 1944

Come now the Appellees: Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Sterling C. Holston and move the Court to dismiss plaintiff Petition and this action for the following reasons:

1. The Court has no jurisdiction over the subject matter of this action.

2. This action involves the use of a channel of Radio transmission and a license therefor, and the control and jurisdiction of such is exclusively in the United States of America acting through and by the Federal Communications Commission by virtue of the provisions of Sub-Chapter I to Sub-Chapter VI inclusive of Chapter 5, Title 47 U. S. C. A.

3. Any person aggrieved, or whose interests are claimed to be adversely affected by any decision of the Federal Communications Commission, must proceed in accordance with the provisions of Sub-Chapter I to Sub-Chapter VI inclusive, of Chapter 5, Title 47 U. S. C. A.

Respectfully submitted, Ramey T. Wells, Peterson & Devoe, Brown, Crossman, West, Barton & Fitch, Attorneys for said Appellees.

[fol. 1106] IN SUPREME COURT OF NEBRASKA

MOTION FOR ORAL ARGUMENT—Filed March 30, 1944

Come now the Appellees: Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Sterling C. Holston who have filed, or will file, a timely Motion and Brief for Rehearing of the opinion and judgment entered herein on March 10, 1944, and move as follows:

I

Said Appellees pursuant to rule 18 (b) move that they be granted oral argument upon their Motion for Rehearing.

II

Said Appellees further move that oral argument upon their Motion for a Rehearing be heard by the entire Court and that the time for oral argument be extended to one hour for each side for the following reasons more fully set forth in the Motion for Rehearing and Brief in support thereof:

1. The Court, upon the original decision of this case, was divided by a vote of four to three.

2. The importance of the issues involved in this case to the parties and the general public interest therein.

3. The opinion and judgment of the Court has raised and developed new issues in this case not heretofore briefed or argued, to wit:

(a) The jurisdiction of this Court over the subject matter of this action.

(b) The opinion and judgment vacate and nullify the action heretofore taken by the Federal Communications Commission in approving the transfer of the license to the Appellee Radio Station WOW, and thereby violate Statutes of the United States of America.

(c) The opinion and judgment invade the exclusive jurisdiction of the Federal Communications Commission over the [fols. F107-1109] subject of this action and contravene and are repugnant to the Interstate Commerce Clause, Article I, Section 8 of the Constitution of the United States.

(d) The opinion and judgment contravene and are repugnant to Article I, Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) The opinion and judgment is based solely upon constructive fraud which was not an issue in the District Court or in the Supreme Court and was not alleged in the Petition of Appellant.

III

Said Appellees further move that in the event oral argument upon their Motion for Rehearing be not convenient to the Court on the rule day thereof, to wit, April 8th, 1944, that the Court fix a later date convenient to the Court.

IV

Said Appellees further move that, in the event oral argument is desired by the Court upon this Request and Motion for an extension of time for oral argument and for oral argument before the entire Court, a date be assigned therefor.

Respectfully submitted, Rainey T. Wells, Peterson & Devoe, Brown, Crossman, West, Barton & Fitch, Attorneys for Said Appellees.

[fol. 1110] IN SUPREME COURT OF NEBRASKA

MOTION FOR REHEARING—Filed March 30, 1944

Come now the appellees, Radio Station WOW, Inc., and John J. Gillin, Jr., and move the Court to vacate and set aside the opinion and judgment entered herein and to grant these appellees a rehearing of this case and the issues involved, and that upon said rehearing oral argument be granted to these appellees and that the judgment of the District Court dismissing plaintiff's action be affirmed for the following reasons:

I

The judgment of the Supreme Court reversing the District Court is based solely upon constructive fraud. Constructive fraud was not an issue in the District Court or the Supreme Court. The issue of constructive fraud was not argued or submitted in either Court, and this Court has not had the benefit of argument and briefs of counsel for appellees thereon.

II

A recovery cannot be had for constructive fraud under a petition alleging actual fraud only. The appellant is not entitled to the relief granted upon the legal principle of constructive fraud for the reason that the only allegations of the petition are of actual fraud. The only issues tried in the District Court were those of actual fraud and these issues have been decided in the District and Supreme Courts in favor of appellees.

III

There is no evidence in the record of constructive fraud and the Court erred in granting appellant the relief prayed upon the theory of constructive fraud.

IV

The Court erred in a finding of constructive fraud based upon:

1. An alleged loss of revenue to the Society based upon speculative earnings.

2. An assumed inadequacy of consideration and an upon speculative future earnings.

3. The relations between Mr. Bradshaw and Mr. Gillin; an alleged inadequate consideration contributed by Mr. Gillin for his interest in the lessee corporation; and the Court's assumption that the $25,000 of accounts receivable were donated to Mr. Gillin, whereas said accounts were in fact transferred to lessee as a part of the leasehold estate and repayment thereof is provided in the lease rental.

4. Mr. Bradshaw's favorable reports to the Society concerning the Radio Station, which reports point out the hazards to the Society in the operation of the Radio Station.

5. The fact that the lease requires no down payment and the absence of a requirement in the lease that the lessee set aside reserves to guarantee performance of lessee's obligations under the lease.

6. The provision of the lease giving lessee the option to cancel in the event the Radio Station is taken over by the government.

7. The fact that title to the fee of the property remains in the lessor and the hazards of unfavorable legislation or government ownership have not been removed.

8. The fact that the Society is not protected in the cancellation of the license not due to the default of the lessee.

9. An assumption that a sale of the Station could have been made for an adequate consideration and the risk of cancellation of the license or government ownership thereby avoided.

[fol. 1112]

V

The Court erred in the inferences drawn and the construction placed upon the conditions, facts and circumstances leading to the execution of the lease.

VI

There is no evidence in the record of any fraud of any kind on the part of the lessee and the Court in the absence

of a finding of fraud participated in by the lessee, or of which the lessee had knowledge, erred in entering judgment against the lessee.

VII

The Court erred in substituting its opinion that the provisions of the lease were inadequate for the unanimous decision of the Board of Directors of the Society approving the terms, provisions, and considerations of the lease made after a careful and prolonged investigation and thorough study of the same and after a determination that the best interests of the Society would be served by the execution of the lease, and after due authorization for such execution.

VIII

The Court erred in substituting its opinion that the provisions of the lease were inadequate for the uncontroverted testimony and opinion of men of wide experience in the radio field and in business generally that the provisions of the lease and the considerations therefor were adequate.

IX

The evidence is insufficient to sustain the finding and judgment of the Court.

X

This Court has no jurisdiction over the subject matter of this action. The subject matter of this action is within the exclusive jurisdiction of the United States and its Courts and Commissions.

[fol. 1113]

XI

The opinion and judgment of the Court is void and unenforceable because it vacates and nullifies the action of the Federal Communications Commission in the issuance of a license to lessee and thereby contravenes and violates the statutes of the United States of America relating to the control and jurisdiction of the channels of radio transmission and providing for the use of such channels.

XII

The judgment and opinion of this Court vacating and setting aside the transfer of the license to operate the Radio Station and ordering that the license to operate the Radio

Station be returned to the Society and directing the lessee to do all things necessary for that purpose is void and unenforceable and contravenes and is repugnant to the Commerce clause of Section 8 of Article I of the Constitution of the United States and to Acts of the Congress of the United States, being the Communications Act of 1934 and amendments thereto, Subchapters I to VI, inclusive, of Chapter 5 of Title 47 of United States Code Annotated, in that exclusive jurisdiction over all the channels of interstate and foreign radio transmission and the use of such channels is vested in the United States, its Federal Communications Commission and its Courts.

XIII

The effect of the opinion of the Court is to leave the lessee with a radio station license but without the equipment to comply with the order and mandate of the Federal Communications Commission.

XIV

Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 1, of the Fourteenth Amendment to the Constitution of the United States, in that they deprive these appellees, and each of them, of their liberty and property without [fols. 1114-1116] due process of law, and in that they deny to them, and each of them, the equal protection of the laws.

XV

Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 3 of Article 1 of the Constitution of the State of Nebraska, in that they deprive these appellees, and each of them, of their liberty and property without due process of law.

'Radio Station WOW, Inc., and John J. Gillin, Jr., Appellees, by Paul P. Massey, William P. Kelley, Cline, Williams & Wright, Their Attorneys.

[fols. 1117-1119] IN SUPREME COURT OF NEBRASKA

MOTION TO DISMISS PLAINTIFFS' PETITION—Filed March 30, 1944

Come now Radio Station WOW, Inc., and John J. Gillin, Jr., Appellees, and move the Court to set aside and vacate its opinion and order and to dismiss plaintiff's Petition and this action for the following reasons:

1. This Court has no jurisdiction over the subject matter of this action.

2. The subject matter of this action is within the exclusive jurisdiction of the United States and its Courts and Commissions.

3. This action involves the use of channels of radio transmission and a license therefor, and the control and jurisdiction of such is exclusively in the United States of America acting through and by the Federal Communications Commission by virtue of the provisions of Sub-Chapter I to Sub-Chapter VI, inclusive, of Chapter 5, Title 47 U. S. Code Annotated.

4. This action with the resulting opinion and judgment of the Supreme Court of Nebraska sets aside and annuls an order and mandate of the Federal Communications Commission of the United States.

5. Any person aggrieved, or whose interests are claimed to be adversely affected by any decision of the Federal Communications Commission, must proceed in accordance with the provisions of Sub-Chapter I to Sub-Chapter VI, inclusive, of Chapter 5, Title 47, U. S. Code Annotated,

Respectfully submitted, Radio Station WOW, Inc., and John J. Gillin, Jr., Appellees; by Paul P. Massey, William P. Kelley, Cline, Williams & Wright, Their Attorneys.

[fol. 1120] IN SUPREME COURT OF NEBRASKA

MOTION FOR ORAL ARGUMENT—Filed March 30, 1944

Come now the Appellees Radio Station WOW, Inc. and John J. Gillin, Jr., who have filed, or will file, a timely Motion and Brief for Rehearing of the opinion and judg-

ment entered herein on March 10, 1944, and moved as follows:

I

Said Appellees pursuant to rule 18 (b) move that they be granted oral argument upon their Motion for Rehearing.

II

Said Appellees further move that oral argument upon their Motion for a Rehearing be heard by the entire Court and that the time for oral argument be extended to one hour for each side for the following reasons more fully set forth in the Motion for Rehearing and Brief in support thereof:

1. The Court, upon the original decision of this case was divided by a vote of four to three.

2. The importance of the issues involved in this case to the parties and the general interest therein.

3. The opinion and judgment of the Court has raised and developed new issues in this case not heretofore briefed or argued, to-wit:

(a) The jurisdiction of this Court over the subject matter of this action.

(b) The opinion and judgment vacate and nullify the action heretofore taken by the Federal Communications Commission in approving the transfer of the license to the Appellee Radio Station WOW, and thereby violate Statutes of the United States of America.

(c) The judgment and opinion of this Court vacating and setting aside the transfer of the license to operate the radio station and ordering that the license to operate the radio station be returned to the Society and directing the lessee to do all things necessary for [fol. 1121] that purpose is void and unforceable and contravenes and is repugnant to the Commerce Clause of Section 8 of Article 1 of the Constitution of the United States and to Acts of the Congress of the United States, being the Communications Act of 1934 and amendments thereto, Subchapters I to VI, inclusive, of Chapter 5 of Title 47 of United States Code Annotated, in that exclusive jurisdiction over all the chan-

nels of interstate and foreign radio transmission and the use of such channels are vested in the United States, its Federal Communications Commission and its Courts.

(d) The effect of the opinion of the Court is to leave the lessee with a radio station license but without the equipment to comply with the order and mandate of the Federal Communications Commission.

(e) Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 1, of the Fourteen Amendment to the Constitution of the United States, in that they deprive these appellees, and each of them, of their liberty and property without due process of law, and in that they deny to them, and each of them, the equal protection of the laws.

(f) Said opinion and judgment of this Court are erroneous and void because they contravene and are repugnant to Section 3 of Article 1 of the Constitution of the State of Nebraska, in that they deprive these appellees, and each of them, of their liberty and property without due process of law.

(g) The opinion and judgment is based solely upon constructive fraud which was not an issue in the District Court or in the Supreme Court and was not alleged in the Petition of Appellant.

[fols. 1122-1123] III

Said Appellees further move that in the event oral argument upon their Motion for Rehearing, be not convenient to the Court on the rule day thereof, to wit, April 8th, 1944, that the Court fix a later date convenient to the Court.

IV

Said Appellees further move that in the event oral argument is desired by the Court upon this request and motion for an extension of time for oral argument and for oral argument before the entire Court, that a date be assigned therefor.

Radio Station WOW, Inc., and John J. Gillin, Jr., Appellees; by Paul P. Massey, William P. Kelley, Cline, Williams & Wright, Their Attorneys.

[fol. 1124] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

APPELLEES' MOTION FOR LEAVE TO FILE SUPPLEMENTAL TRANSCRIPT No. 2—Filed March 30, 1944

Come now the Appellees and move that they be granted leave to file Supplemental Transcript No. 2 which is attached hereto and made a part hereof.

In support of this motion, Appellees allege that the pleadings and order included in said Supplemental Transcript No. 2 bring an additional portion of the record to this Court specifically affected by the opinion and judgment of March 10, 1944, reference to which is made in the several requests, motions and briefs filed by the Appellees concurrently herewith.

Rainey T. Wells, Peterson & Devoe, by R. W. Devoe. Brown, Crossman, West, Barton & Fitch, by Raymond M. Crossman, Attorneys for the Appellees, Woodmen of the World Life Insurance Society, et al. Wm. P. Kelley, Paul P. Massey, Cline, Williams & Wright, by Earl Cline, Attorneys for the Appellees, Radio Station WOW, Inc., et al.

[fols. 1125-1126] [File endorsement omitted]

[fol. 1127] IN SUPREME COURT OF NEBRASKA

Proposed Supplemental Transcript

[fol. 1128] IN THE DISTRICT COURT OF DOUGLAS COUNTY

[Title omitted]

MOTION TO STRIKE PARTS OF PETITION—Filed December 28, 1942

Come now the defendants, Radio Station WOW, Inc., and John J. Gillin, Jr., and each separately move the Court for an order striking from the petition the following mentioned parts:

I

The last sentence of Paragraph Nine (9) appearing on page Seven (7), beginning with the words "Said application is now" and ending with the word "Nebraska" for the reason that the statements therein contained are argumentative, are irrelevant, immaterial and incompetent, and constitute a conclusion of the pleader and for the further reason that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission.

[fol. 1129] II

All of Paragraph Twelve (12) and each sub-paragraph thereof for the reason that the allegations therein contained are incompetent, irrelevant and immaterial; constitute conclusions of the pleader and neither seek to prove nor disprove, add to or detract from, any material allegation in said petition contained.

Radio Station WOW, Inc., John J. Gillin, Jr. By Paul P. Massey, Their Attorney.

[File endorsement omitted.]

In the District Court of Douglas County

[Title omitted]

Motion to Make More Definite and Certain and to Strike Certain Allegations from the Petition—Filed December 28, 1942

Come now the defendants, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, [fol. 1130] R. E. Miller, Sterling C. Holston, on behalf of themselves and each of them, and file this Motion and move the Court to require the plaintiff to strike certain language and allegations from his petition for the reason that said language and allegations are conclusions of the pleader, argumentative, redundant, immaterial, irrelevant and neither seek to prove or disprove any material allegations in said petition contained, as follows:

1

The last sentence of paragraph 4 of the petition, reading as follows: "The defendant officers have at all times hereinafter mentioned and do now dominate and control the management and affairs of the Society".

2

Paragraph 9 of the petition, reading as follows: "Shortly prior to September 1, 1942, the exact date being to plaintiff unknown, the individual defendants, in violation of their duties as officers of the Society and the trust reposed in them as such officers, devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of aid station WOW for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose, the individual defendants did and caused to be done the following acts:".

3

The last clause of paragraph 9, subparagraph (e) of the petition, reading as follows: "and objections to the granting of consent to the aforesaid assignment of the radio station without a public hearing have been made by Hon. Dan [fol. 1131] Butler, mayor of the City of Omaha, Nebraska, for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska".

4

The last two sentences of paragraph 11 of the petition, reading as follows: "If for any reason the earnings of the station should decline to a point where the payment of the rental named in the lease would be unprofitable for defendant Radio Station WOW, Inc., it can then cause the lease to be terminated and the station returned to the Society for operation with its earnings thus reduced. The lease is aptly described by paraphrasing a familiar saying to 'heads Radio Station WOW, Inc. wins, tails the Society loses'."

5

Paragraph 12, subparagraphs a, b, c, d, e and f of the petition, reading as follows: "Defendant Bradshaw's son-in-law, John B. Dawson, is a lawyer residing in New York

City with his office at 48 Wall Street. He has been handling legal matters for the companies engaged in the sale of bonds issued by the Consumers' Public Power District in connection with its acquisition of power facilities, and is expected to render similar services if such power facilities in Omaha are acquired by Consumers' Public Power District. The companies engaged in the sale of such bonds will receive a large amount for their services in selling such bonds. The amount is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00. Defendant Bradshaw has strongly urged the aforesaid sale of such power facilities, and he, together with other officers of the Society, recently resigned from the Omaha Chamber of Commerce because they disapproved its opposition to such sale.

[fol. 1132] "(b) Defendant Gillin is president, director and the largest stockholder of defendant Radio Station WOW, Inc., and he is to become the manager of the station for that company. He has for many years been the manager of radio station WOW for the Society and a protege and close associate of defendant Bradshaw.

"(c) Guy C. Myers, Vice President, director and second largest stockholder of defendant Radio Station WOW, Inc. resides near New York City, with his office at 35 Wall Street, New York City. He is now and has been for the past several years engaged in promoting the sale of various power facilities to Consumers' Public Power District, including those now owned and operated by Nebraska Power Company at Omaha, Nebraska. Myers receives as compensation for such services a contingent fee in the form of a commission based on the purchase price of the facilities acquired. The amount of such commission, in the event he makes a sale of the Omaha facilities, is unknown to plaintiff, but plaintiff is informed and believes that it is more than $500,000.00.

"(d) Francis P. Matthews, Vice President, director and large stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is now and has been for many years engaged in the practice of law and is attorney for Consumers' Public Power District.

"(e) M. M. Meyers, Secretary, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha

where he is engaged in the business of buying and selling bonds and he is to participate in the sale of bonds issued by the Consumers' Public Power District in the event it acquires the facilities of the Nebraska Power Company in Omaha, Nebraska.

[fol. 1133] "(f) Harvey E. Milliken, treasurer, director and stockholder of defendant Radio Station WOW, Inc., resides in Omaha where he is engaged in the printing business. The printing company with which he is associated has for many years done a large volume of printing for the Society. He has for many years been a close personal friend of defendant Bradshaw and has favored and urged the sale of the aforesaid power facilities to Consumers' Public Power District.

"Other persons whose names are unknown to plaintiff are interested in defendant Radio Station WOW, Inc. and in its operation of station WOW and in the benefits and profits therefrom. The obvious purpose of the leasing of the station as aforesaid is to make the radio station available to the Consumers' Public Power District and those interested in its acquiring such power facilities for spreading propaganda favoring such sale. The sale of such power facilities affects only a small part of the membership of the Society and the use of the station to sponsor such sale is contrary to the objects and purposes of the Society and to the best interests of the Society and its members and to the listeners of the station and to the public generally".

6

Paragraph 13 (erroneously numbered 11) of the petition, reading as follows: "Defendant officers of the Society did not, prior to the execution of the aforesaid lease, disclose to the Society's members the fact that it contemplated the execution of such lease, but on the contrary, carefully concealed its intention to deprive the Society of the most valuable single asset of the Society for a grossly inadequate consideration and to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to the Consumers' Public Power District as aforesaid".

[fol. 1134] Come now the defendants, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess,

W. C. Braden, R. E. Miller, Sterling C. Holston, on behalf of themselves and each of them, and file this motion and move the Court that if plaintiff be not required to strike the language and allegations of his petition as set out in paragraphs 1 and 2 above, that plaintiff be required to make said language and allegations more definite and certain, for the reason that said language and allegations are conclusions of the pleader, indefinite and uncertain in their meaning and intent, as follows:

A

The last sentence of paragraph 4 of the petition, reading as follows: "The defendant officers have at all times hereinafter mentioned and do now dominate and control the management and affairs of the Society," and to plead definitely and with particularity the manner, method and means by which said officers dominate and control the management and affairs of the Society.

B

The allegation of paragraph 9 of the petition, reading as follows: "* * * devised a plan to unlawfully procure for the benefit and profit of themselves and associates the possession and control of radio station WOW for a grossly inadequate consideration * * *", and to definitely, specifically and with particularity allege the manner, means and method by which said officers could or would procure for the benefit and profit of themselves and associates the possession and control of Radio Station WOW.

[fol. 1135] Respectfully submitted, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston, By Rainey T. Wells, Attorney for said Defendants.

[File endorsement omitted.]

In District Court of Douglas County

[Title omitted]

Order Overruling Motions to Strike, Etc.—January 14, 1943

Now, on this day, this cause comes on for hearing upon motions of defendants heretofore filed herein December 28, [fol. 1136] 1942, for an order of the Court to strike certain parts of petition and requiring the petition to be made more definite and certain, upon consideration whereof and being fully advised in the premises,

It is ordered by the Court that said motions be and the same hereby are severally overruled.

[fols. 1137-1153] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1154-1155] Supreme Court of Nebraska

[Title omitted]

Order Denying Motions to File 2nd Supplemental Transcript—April 5, 1944

This cause coming on to be heard upon motion of all appellees for leave to file supplemental transcript herein, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion of all appellees for leave to file supplemental transcript be, and hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 1156-1157] Supreme Court of Nebraska

[Title omitted]

Minute Entry of Argument on Motion to Dismiss—April 5, 1944

This cause coming on to be heard upon motion of appellees Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William

Ruess, W. C. Braden, R. E. Miller and Stanley C. Holston to dismiss the action, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that ruling on said motion to dismiss action be, and hereby is, reserved for consideration with motion for rehearing.

Robert G. Simmons, Chief Justice.

[fols. 1158-1159] Supreme Court of Nebraska

[Title omitted]

Minute Entry of Argument on Motion to Dismiss—April 5, 1944

This cause coming on to be heard upon motion of appellees Radio Station WOW, Inc., and John J. Gillin, Jr., to dismiss the action, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that ruling on said motion to dismiss action be, and hereby is, reserved for consideration with motion for rehearing.

Robert G. Simmons, Chief Justice.

[fols. 1160-1161] Supreme Court of Nebraska

[Title omitted]

Order on Argument of Motion for Rehearing—April 5, 1944

This cause coming on to be heard upon motion of appellees Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Stanley C. Holston for an extension of time for oral argument on motion for rehearing, and for argument on said motion for rehearing to the entire court, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time for argument on motion for rehearing and for argument to the entire court be, and hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 1162-1163] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER ON ARGUMENT OF MOTION FOR REHEARING—April 5, 1944

This cause coming on to be heard upon motion of appellees Radio Station WOW, Inc., and John J. Gillin, Jr., for extension of time for oral argument on motion for rehearing, and for argument on said motion for rehearing to the entire court, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time for argument on motion for rehearing and for argument to the entire court be, and hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 1164-1165] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTIONS TO DISMISS PETITIONS—May 26, 1944

This cause coming on to be heard upon motion of appellees Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, and Stanley C. Holston, and motion of appellees Radio Station WOW, Inc., and John J. Gillin, Jr., to dismiss the action, was argued by counsel and submitted to the court; upon due consideration whereof, it is by the court ordered that said motions to dismiss be, and the same hereby are, overruled.

Robert G. Simmons, Chief Justice.

[fols. 1166-1167] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTIONS FOR REHEARING—May 26, 1944

This cause coming on to be heard upon motion of appellees Woodmen of the World Life Insurance Society, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller and Stanley C. Holston, and motion of appellees Radio Station WOW, Inc., and John J. Gillin, Jr., for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein, to wit, on March 10, 1944. It is, therefore, considered, ordered and adjudged that the judgment and opinion of this court entered and filed herein on March 10, 1944, be, and hereby are, adhered to, said motions of appellees for rehearing are overruled and a rehearing herein is denied.

Robert G. Simmons, Chief Justice.

[fol. 1168] IN SUPREME COURT OF NEBRASKA

31685

JOHNSON,

v.

RADIO STATION WOW, INC.

OPINION IN REHEARING—Filed May 26, 1944

1. A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the facts pleaded and the evidence adduced in support thereof.

2. The power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission by virtue of subchapter I to subchapter VI, inclusive, of Chapter 5, Title 47, U. S. C. A.

3. A judgment of this court, vacationg a lease of a radio station on the ground of constructive fraud and ordering a return of the property to its former owner in a representative suit, in no way affects or encroaches upon the granted powers of the Federal Communications Commission to license, or to transfer, assign or annul such a license.

4. A constitutional question not presented to the district court cannot be raised for the first time on an appeal to the supreme court.

[fol. 1169] Heard before Paine, Carter, Messmore, Yeager, Chappell and Wenke, JJ.

CARTER, J.

Our first opinion in this case will be found *ante*, p. —, 13 N. W. 2d 556. In that opinion we determined that the lease of the radio station, which was the subject matter of the action, was made and procured as the result of constructive fraud. The facts upon which this holding was based are set out in the former opinion and will not be repeated here. The lease was thereupon set aside and directions given ordering the restoration of the property to the Woodmen of the World Life Insurance Society, the owner and lessor. Motions for a rehearing have been filed which raise certain questions not heretofore presented that are deserving of consideration.

It is urged by the defendants that the issue of constructive fraud was not pleaded and that the holding of the court that the lease should be set aside because of constructive fraud constitutes a fatal variance from the pleadings. The petition meticulously recites the facts and prays for a decree declaring the lease to be illegal and void because of fraud and ordering cancellation and termination of the same, and for such other, further and different relief as equity and justice may require. Neither the words "actual" or "constructive" were used in connection with the charging of fraud in plaintiff's petition. Under our system of Code pleading, a petition is required to contain a statement of the facts constituting the cause of action in ordinary and concise language. Comp. St. 1929, sec. 20-804. Legal conclusions as to the nature of the action are not required and are not considered good pleading. State ex rel. Johnson v.

Wagner, 139 Neb. 471, 297 N. W. 906. The character of a [fol. 1170] cause of action is determined by the allegations of fact contained in the petition, unaffected by the conclusions of the pleader. An authoritative text states the rule as follows: "Generally, however, it may be said, that the essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is at law or in equity, unaffected by the conclusions of the pleader or by what the pleader calls it, or the prayer for relief, or the nature of the defense interposed, or new matter stated in the reply, or whether the action is statutory or otherwise." 1 C. S. J. 1152, sec. 54. The prayer of the petition asks for general equitable relief and is not, therefore, so restrictive as to preclude the holding that constructive fraud exists. In School District No. 70 v. Wood, *ante*, p. —, 13 N. W. 2d 153, we said: "A prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court." In the same case we also said: "A prayer for general relief in an equity action is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence, even though he may have misconstrued his remedy and prayed specially for lesser relief." A constructive fraud is usually defined as "a breach of duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive, to violate confidence, or to injure public interests." 37 C. J. S. 211, sec. 2c. Constructive fraud generally arises from a breach of duty arising out of fiduciary or confidential relationship. An examination of the pleadings and the evidence reveals the correctness of the holding in our former opinion that a con-trustive fraud was sufficiently pleaded and proved by the evidence. Consequently, the claim of defendants that such a holding constitutes a fatal variance from the pleadings and the evidence is without merit.

[fol. 1171] Defendants urge that the subject matter of this action is solely within the jurisdiction of the Federal Communications Commission Act, subchapter I to subchapter VI, inclusive, of chapter 5, Title 47, U. S. C. A., and that this court is therefore without jurisdiction to pass upon the issues raised herein. This contention is in part based upon the interpretation placed by them upon that part of our former opinion as follows: "It is therefore ordered that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station

be vacated and set aside. * * * that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the leases; * * *."

We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission. Such a license is a permissive grant of a privilege and creates no vested property right in the licensee. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693; American Bond & Mtg. Co. v. United States, 52 Fed. 2d 318. But the right of the Federal Communications Commission to license and to require compliance with the regulations of the commission does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto. It is true that the Federal Communications Commission may refuse to approve the reissuance of a license to the Woodmen of the World Life Insurance Society. That is a hazard that every radio station operator must take. It is a matter that does not concern this court and is not involved in the decision of [fol. 1172] the case now before us. In any event, it leaves the Woodmen of the World Life Insurance Society in no different position than if it was obliged to take the station back under the express terms of the lease. The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed.

The claim of defendants that the court has no jurisdiction of the subject matter of the action is contrary to the pleadings filed by the defendants in the trial court. In their answers the defendants say: "Defendants further allege that the Federal Communications Commission by virtue of the laws of the United States of America and its rules and regulations made pursuant thereto, has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station * * *." We think this allegation correctly recites the jurisdiction of the state courts in relation to the jurisdiction of the Federal Communications Commission. Our former opinion, correctly

interpreted, we think, states the same conclusion. In any event, the trial court and consequently this court, has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter exclusively within the granted powers of the commission. Southern Broadcasting Corporation v. Carlson, 187 La. 823, 175 So. 587. It was not our understanding that there was any contention to the contrary. Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion.

[fol. 1173] The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit. It is a representative suit brought by one member of the society on behalf of all to protect the interest of all from loss resulting from a lease of valuable property of the society alleged to have been fraudulently made. The fact that the property involved was used in a licensed business was an incident to the suit only. The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf.

Defendants also contend that the former opinion and judgment of this court are void because they contravene section 1 of the Fourteenth Amendment to the Constitution of the United States in that they deprive these defendants of their liberty and property without due process of law and that they deny them the equal protection of the laws. It is also asserted that such opinion and judgment contravene section 3, article 1 of the Constitution of the State of Nebraska in that they deprive defendants of their liberty and property without due process of law.

These questions were not raised in the lower court. They appear nowhere in the pleadings and are for the first time asserted in the motions for a rehearing after an opinion and judgment were entered. This court has repeatedly held that constitutional questions will not be considered unless raised in the trial court. Bell v. Niemann, 127 Neb. 762, 257 N. W. 69; Howarth v. Becker, 128 Neb. 580, 259 N. W. 505. It is a fundamental rule that the appellate jurisdiction of this court is limited to a review of the rulings of inferior tribunals duly excepted to at the time and to a correction of those which are found to be erroneous; not the consideration of questions first raised after the case is brought here, except

[fols. 1174-1175] they be those involving jurisdiction. This has been the law since this court was first established and we see no reason for departing from it now. See Courtnay v. Price, 12 Neb. 188, 110 N. W. 698.

All other questions raised are properly and adequately disposed of in our former opinion. The former opinion is adhered to and the motion for a rehearing is denied.

Yeager and Chappell, JJ., dissent.

[fol. 1176] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

APPELLEES' MOTION FOR AN ORDER STAYING THE ISSUANCE OF A MANDATE—Filed May 26, 1944

Come now the appellees Radio Station WOW, Inc. (a Nebraska Corporation), Woodmen of the World Life Insurance Society (a Nebraska Corporation), De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., and respectfully show to the Court that they desire to prosecute proceedings by appeal or certiorari, to the Supreme Court of the United States, from the decision and judgment rendered in this case by this honorable court on the 10th day of March, 1944, and from the orders of this honorable court overruling the separate motions of these appellees for rehearing on the 26th day of May, 1944; that appellees hereby offer to give a bond in such amount and containing such conditions as the court may specify as a condition for the granting of such stay.

Wherefore the undersigned pray for an order staying the issuance of the mandate of this court during the pendency of said proceedings in the Supreme Court of the United States.

Rainey T. Wells. Peterson & Devoe by R. W. Devoe, Brown, Crossman, West, Barton & Fitch by Raymond M. Crossman, Attorneys for the Appellees, Woodmen of the World Life Insurance Society, et al. William P. Kelley, Paul P. Massey. Cline, [fols. 1177-1178] Williams & Wright by Earl Cline, Attorneys for the Appellees, Radio Station WOW, Inc., et al.

[File endorsement omitted.]

[fols. 1179-1180] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

APPELLEES' ADDITIONAL MOTION FOR AN ORDER STAYING THE ISSUANCE OF MANDATE—Filed May 26, 1944

Come now the appellees, Radio Station WOW, Inc. (a Nebraska Corporation), Woodmen of the World Life Insurance Society (a Nebraska Corporation), De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., and respectfully show to the Court that they desire to persecute proceedings by appear- of certiorari, to the Supreme Court of the United States, from the opinion, decision and judgment rendered in this cause by this honorable court on the 10th day of March 1944, and from the opinion, decision and judgment rendered in this cause by this honorable court on the 26th day of May, 1944, and from the orders of this honorable court overruling the separate motions of these appellees for rehearing on the 26th day of May, 1944; that appellees hereby offer to give a bond in such amount and containing such conditions as the court may specify as a condition for the granting of such stay.

Wherefore, the undersigned pray for an order staying the issuance of the mandate of this court during the pendency of said proceedings in the Supreme Court of the United States.

Rainey T. Wells, Peterson & Devoe, Brown, Crossman, West, Barton & Fitch by R. W. Devoe, Attorneys for the Appellees, Woodmen of the World Life Insurance Society, et al. William P. Kelley, Paul P. Massey, Cline, Williams & Wright, Attorneys for the Appellees, Radio Station WOW, Inc., et al.

[File endorsement omitted.]

[fols. 1181-1182] SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—May 27, 1944

This cause coming on to be heard upon motions of appellees for an order staying issuance of mandate herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motions of appellees be, and hereby are, sustained and the issuance of mandate is hereby directed to be withheld until August 25, 1944, pending proceedings on certiorari to the Supreme Court of the United States, upon the giving of bond in the sum of $50,000, to be approved by the clerk of this court, conditioned for the performance by said appellees of the judgment of this court in the event the same is not reversed or modified by the Supreme Court of the United States.

Robert G. Simmons, Chief Justice.

[fol. 1183] IN SUPREME COURT OF NEBRASKA

SUPERSEDEAS BOND—Filed June 12, 1944

Whereas, the Supreme Court of the State of Nebraska on May 26, 1944, overruled the motions for rehearing filed in this cause by appellees; and

Whereas, the Supreme Court of the State of Nebraska on May 27, 1944, on motions of appellees entered an Order staying the issuance of a mandate herein until August 25, 1944, pending proceedings on certiorari to the Supreme Court of the United States upon the giving of bond in the sum of Fifty Thousand Dollars ($50,000.00), as follows:

"This cause coming on to be heard upon motions of appellees for an order staying issuance of mandate herein, was submitted to the court; upon consideration whereof, it is by the court ordered that said motions of appellees be, and hereby are, sustained and the issuance of mandate is hereby directed to be withheld until August 25, 1944, pending proceedings on certiorari to the Supreme Court of the United States, upon the giving of bond in the sum of $50,000.00, to be ap-

proved by the clerk of this court, conditioned for the performance by said appellees of the judgment of this court in the event the same is not reversed or modified by the Supreme Court of the United States.

(S.) Robert G. Simmons, Chief Justice."

Now, therefore, in compliance with said Order, Radio Station WOW, Inc., a corporation, Woodmen of the World [fol. 1183a] Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., appellees herein, as Principals, and the National Surety Corporation, a corporation, duly and legally authorized to transact business in the State of Nebraska and to execute this bond, as Surety, are held and firmly bound unto Homer H. Johnson, as plaintiff and appellant herein, in the sum of Fifty Thousand Dollars ($50,000.00) for the payment of which well and truly to be made we hereby bind ourselves and our respective successors, executors, administrators or assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this the 5 day of June, 1944.

Now the condition of this obligation is such that if the appellees herein perform the judgment of this Court in the event the same is not reversed or modified by the Supreme Court of the United States, then the above obligation to be void; otherwise to remain in full force and effect.

Radio Station WOW, Inc., a Corporation, by John J. Gillin, Jr., President; Woodmen of the World Life Insurance Society, a Corporation, by Farrar Newberry, President; De E. Bradshaw, Farrar Newberry, W. C. Braden, Sterling C. Holston, [fols. 1183b-1184] R. E. Miller, John J. Gillin, Jr., T. E. Patterson, William Ruess, Principals; National Surety Corporation, by Fred Liles, Surety, Attorney-in-fact.

Witnesses: J. M. Sturdevant. J. M. Sturdevant, Eileen McCarthy, J. M. Sturdevant, Ethel H. Wallin, T. E. Newton, K. V. Peterson, J. M. Sturdevant, M. A. Gibson, Herbert B. Kennedy, M. A. Schaefer.

This bond and the sufficiency of the surety thereon approved by me this 12th day of June, 1944.

Geo. H. Turner, Clerk of the Supreme Court of Nebraska.

Countersigned by A. B. Grotte, Nebraska Commissioned Agent.

[fol. 1185] SUPREME COURT OF NEBRASKA

[Title omitted]

AMENDED ORDER STAYING MANDATE—July 11, 1944

It appearing to the court that the order entered on May 27, 1944, by its terms staying the issuance of the mandate herein is too limited in its scope and extent;

It is now ordered by the court, upon its own motion, that the motions of appellees filed herein on May 26, 1944, for stay of the mandate herein be, and the same hereby are, sustained and the issuance of mandate herein be, and the same hereby is, stayed to August 25, 1944, pending the filing of an application for writ of certiorari in the Supreme Court of the United States, and if said application be perfected and filed and the case docketed in the Supreme Court of the United States within said period, or any extension thereof, that the issuance of mandate and the execution and enforcement of the judgment herein shall be further stayed until the application for the writ of certiorari has been acted upon by the Supreme Court of the United States, and if the writ be granted, the issuance of the mandate and execution and enforcement of the judgment be further stayed until the cause has been finally disposed of by the Supreme Court of the United States, upon the giving of bond by the appellees in the sum of Fifty Thousand ($50,000.00) Dollars, to be approved by a judge of this court, conditioned that if the appellees fail to make application for such writ within the period of time allotted therefor, [fols. 1186-1187] or any extension thereof, or fail to obtain an order granting their application or fail to make their plea good in the Supreme Court of the United States, they shall answer for all damages and costs which the appellant may sustain by reason of the stay and conditioned further

for the performance by said appellees of the judgment of this court in the event the same is not reversed or modified by the Supreme Court of the United States.

It is further ordered on the court's own motion that the order entered herein on May 27, 1944, which by its terms stayed the issuance of the mandate herein and provided for the giving of a bond, be, and the same hereby is, upon the filing and approval of the bond by this order required, vacated and set aside, and that the bond heretofore filed and approved in conformity with said order of this court of May 27, 1944, be then stricken from the record and the obligors thereon, including the surety, be discharged and released from any liability thereon.

Robert G. Simmons, Chief Justice.

[fol. 1188] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

SUPERSEDEAS BOND—Filed July 15, 1944

Whereas, the Supreme Court of the State of Nebraska on May 26, 1944, overruled the separate motions for rehearing filed in this cause by appellees; and

Whereas, the Supreme Court of the State of Nebraska on May 27, 1944, on motions of appellees entered an Order staying the issuance of a mandate herein until August 25, 1944, pending proceedings on certiorari to the Supreme Court of the United States upon the giving of bond in the sum of Fifty Thousand ($50,000.00) Dollars, as follows:

> "This cause coming on to be heard upon motions of appellees for an order staying issuance of mandate herein, was submitted to the court; upon consideration whereof, it is by the court ordered that said motions of appellees be, and hereby are, sustained and the issuance of mandate is hereby directed to be withheld until August 25, 1944, pending proceedings on certiorari to the Supreme Court of the United States, upon the giving of bond in the sum of $50,000.00, to be approved by the clerk of this court, conditioned for the performance by said appellees of the judgment of this court in the event the same is not reversed or modified by the Supreme Court of the United States.
>
> (S.) Robert G. Simmons, Chief Justice."

[fol. 1189] and

Whereas, in compliance with said Order the appellees herein, as Principals, on June 5, 1944, executed a bond to the defendant and appellant herein, as Obligee therein, in the sum of Fifty Thousand ($50,000.00) Dollars with the National Surety Corporation, as Surety thereon, which said bond was approved by the Clerk of this Court and filed herein on June 12, 1944; and

Whereas, on the 11th day of July, 1944, on its own motion the Supreme Court of the State of Nebraska entered an Order herein, as follows:

"It appearing to the court that the order entered on May 27, 1944, by its terms staying the issuance of the mandate herein is too limited in its scope and extent,

"It Is Now Ordered by the Court, upon its own motion, that the motions of appellees filed herein on May 26, 1944, for stay of the mandate herein be, and the same hereby are, sustained and the issuance of mandate herein be, and the same hereby is, stayed to August 25, 1944, pending the filing of an application for writ of certiorari in the Supreme Court of the United States, and if said application be perfected and filed and the case docketed in the Supreme Court of the United States within said period, or any extension thereof, that the issuance of mandate and the execution and enforcement of the judgment herein shall be further stayed until the application for the writ of certiorari has been acted upon by the Supreme Court of the United States, and if the writ be granted, the issuance of the mandate and the execution and enforcement of the judgment be further stayed until the cause has been finally disposed of by the Supreme Court of the United States, upon the giving of bond by the appellees in the sum of Fifty Thousand ($50,000.00) Dollars, to be approved by a judge of this court, conditioned that if the appellees fail to make application for such writ within the period of time allotted therefor, or any extension thereof, or fail to obtain an order granting their application or fail to make their plea good in the Supreme Court of the United States, they shall answer for all damages and costs which the appellant may sustain by reason of the stay and conditioned further for the performance by said appellees of the judgment of this court in the event

the same is not reversed or modified by the Supreme Court of the United States.

[fol. 1190] "It Is Further Ordered on the court's own motion that the order entered herein on May 27, 1944, which by its terms stayed the issuance of the mandate herein and provided for the giving of a bond, be, and the same hereby is, upon the filing and approval of the bond by this order required, vacated and set aside, and that the bond heretofore filed and approved in conformity with said order of this court of May 27, 1944, be then stricken from the record and the obligors thereon, including the surety, be discharged and released from any liability thereon. July 11, 1944.

(S.) Robert G. Simmons, Chief Justice."

Now, Therefore, in compliance with said Order of July 11, 1944, Radio Station WOW, Inc., a corporation, Woodmen of the World Life Insurance Society, a corporation, De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., appellees herein, as Principals, and the National Surety Corporation, a corporation, duly and legally authorized to transact business in the State of Nebraska and to execute this bond, as Surety, are held and firmly bound unto Homer H. Johnson, as plaintiff and appellant herein, in the sum of Fifty Thousand ($50,000.00) Dollars for the payment of which well and truly to be made we hereby bind ourselves and our respective successors, executors, administrators or assigns, jointly and severally, firmly by these presents.

Dated this 11th day of July, 1944.

Now the condition of this obligation is such that if the appellees fail to make application for writ of certiorari in the Supreme Court of the United States within the period of time allotted therefor, or any extension thereof, or fail [fols. 1191-1193] to obtain an order granting their application, or fail to make their plea good in the Supreme Court of the United States, they shall answer for all damages and costs which appellant herein may sustain by reason of the stay of the issuance of the mandate granted in said order of July 11, 1944, and if the appellees herein perform the judgment of this Court in the event the same is not reversed

or modified by the Supreme Court of the United States, then the above obligation to be void; otherwise to remain in full force and effect.

Radio Station WOW, Inc., a Corporation, by (S.) John J. Gillin, Jr., President. (Seal.) Woodmen of the World Life Insurance Society, a Corporation, by (S.) Farrar Newberry, President. (Seal.) De E. Bradshaw, T. E. Patterson, Farrar Newberry, John J. Gillin, Jr., William Ruess, Sterling C. Holston, W. C. Braden, R. E. Miller, Principals. National Surety Corporation, by Fred Liles, Surety, Attorney-in-fact. (Seal.)

Witnesses: Emma Wood. Emma Wood, Eileen McCarthy, M. A. Gibson, Emma Wood, Emma Wood, Ethel H. Wallin, Emma Wood, Ethel H. Wallin, Emma Wood. Dorothy Klonus, countersigned by A. B. Gratle, Nebr. Res. Agent.

The foregoing bond and the sufficiency of the surety thereon is hereby approved this 15th day of July, 1944.

Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska.

[fols. 1194-1196] [File endorsement omitted.]

[fol. 1197] IN SUPREME COURT OF NEBRASKA

CERTIFICATE OF CLERK OF SUPREME COURT OF NEBRASKA TO CERTIFIED TRANSCRIPT OF THE RECORD

STATE OF NEBRASKA,
County of Lancaster, ss.:

I, the undersigned, George H. Turner, Clerk of the Supreme Court of Nebraska and custodian of the records and files thereof, hereby certify that I have prepared a complete transcript of the record in the case entitled Homer H. Johnson, Appellant (Plaintiff) vs. Radio Station WOW, Inc., et al., Appellees (Defendants), No. 31685, identified as Volume I, Volume II and Volume III; being pages 1 to 400, inclusive, of Volume I of said transcript, and being pages 401 to 863, inclusive, of Volume II of said transcript, and being pages 864 to 1196, inclusive, of Volume III of said

transcript, and I hereby certify that the same constitutes a true, full, and complete transcript of the entire record of said case filed in this Court on appeal from the District Court of Douglas county, Nebraska, and the record and proceedings in said case had in this Court as the same appear of record and on file in my office.

I further certify that the briefs transmitted herewith and identified as Briefs numbered 1 to 9, inclusive, and separately certified, are all of the original briefs filed in this Court by the parties respectively, as follows:

Brief numbered 1, being one of the original briefs of appellant filed herein on September 30, 1943.

Brief numbered 2, being one of the original briefs of appellees, Woodmen of the World Life Insurance Society et al., filed herein on October 2, 1943.

Brief numbered 3, being one of the original briefs of appellees, Radio Station WOW, Inc., et al., filed herein on October 2, 1943.

Brief numbered 4, being one of the original reply briefs of appellant filed herein on November 1, 1943.

[fol. 1198] Brief numbered 5, being one of the original motions for rehearing and one of the original briefs in support thereof of the appellees, Woodmen of the World Life Insurance Society, et al., filed herein on March 30, 1944.

Brief numbered 6, being one of the original motions for rehearing and one of the original briefs in support thereof of the appellees Radio Station WOW, Inc., et al., filed herein on March 30, 1944.

Brief numbered 7, being one of the original of plaintiff's memorandum on defendants' motion to dismiss, filed herein on April 5, 1944.

Brief numbered 8, being one of the original of plaintiff's memorandum on defendants' motion for rehearing, filed herein on April 8, 1944.

Brief numbered 9, being one of the supplemental briefs in support of motion for rehearing of the appellees Radio Station WOW, Inc., et al., filed herein on April 10, 1944.

In witness whereof, I have hereunto set my hand and officially affixed the seal of said Court, at my office, at Lincoln, Nebraska, this 17th day of July, 1944.

Geo. H. Turner, Clerk of Supreme Court of Nebraska. (Seal.)

[fol. 1199] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO RECORD

To Homer H. Johnson, Respondent, and Don W. Stewart and Ralph W. Slocum, his attorneys of record:

The petitioners, Radio Station WOW, Inc., et al., respectfully submit to you under Rule 38, paragraph 8, of the rules of the Supreme Court of the United States, a stipulation to omit from the printed record for the use of this Court, certain unnecessary parts included in the certified transcript of the record, and request that you join us in the execution of the following stipulation:

STIPULATION FOR THE PRINTING OF THE RECORD

It is hereby stipulated and agreed by and between the parties hereto that there may be omitted from the printed record for the use of this Court the following from the certified transcript of the record, as certified by George H. Turner, Clerk of the Supreme Court of the State of Nebraska, on July 17, 1944:

[fol. 1200] 1. Omit printing p. 69, Exhibit 2, except title page and title "Objects and Beneficiaries," (p. 4) and the first paragraph of Section 3 thereunder.

2. Omit printing p. 71, Exhibit 3, except:

(a) title page;

(b) title "Name" (p. 3) and Section 1 thereunder;

(c) title "Powers" (p. 3) and first sentence of Section 2 thereunder;

(d) title "Objects and Beneficiaries" (p. 4) and first paragraph of Section 3 thereunder;

(e) title "Duties of Officers" (p. 6) and subparagraph (a) of Section 10 thereunder;

(f) title "Board of Directors" (p. 17), and subparagraphs (a), (b), (c), (d), and (e), of Section 26 thereunder (pp. 17 and 18), and subparagraph (b) of Section 27 thereunder (p. 19);

(g) title "Sovereign Camp Meeting" (p. 19) and subparagraphs (a) and (b) of Section 28 thereunder;

(h) title "Election, Term of Office, and Installation" (p. 21) and subparagraphs (a) and (b) of Section 35 thereunder.

3. Omit printing p. 73, Exhibit 4, being November, 1942, issue of Woodmen of the World Magazine (24 pages).

4. Omit printing p. 74, beginning with q. 8, and also pp. 75, 76, 77, and 78, inclusive, down to the name "Farrar Newberry."

5. Omit printing p. 88, beginning with q. 65, and also pp. 89, 90, 91, 92, 93, 94, 95, and 96 down to and including q. 127.

6. Omit printing all of p. 123 beginning with q. 231 down to and including q. 239 on p. 124.

7. Omit printing balance of p. 124 beginning with q. 242 and also omit printing pp. 125, 126, 127, to and including all of p. 128.

8. Omit printing p. 245, Exhibit 13, photostat copy of lease to radio broadcasting station equipment, Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., for the reason that it was previously designated to be included in the printed record as Exhibit A attached to the answer of Woodmen of the World Life Insurance Society, et al.

9. P. 245, Exhibit 14, omit only the printing of the floor diagrams attached thereto.

[fol. 1201] 10. Omit printing pp. 402, 403, 404, 405, 406, 407, 408, 409, and 410, for the reason that they are duplicates of pp. 54, to and including p. 62, heretofore included for printing.

11. Omit printing pp. 924 to 935, inclusive, Petition in Equity, Exhibit A, attached to Exhibit 33, for the reason that it has been previously designated for printing and being the plaintiff's petition in this action.

12. P. 1012, Exhibit 36, omit printing all except inside title page of the report, title and paragraphs under "Insurance Building," title and paragraphs under "Tax Litigation," and title and paragraphs under "Proposed Tax Legislation," and title and paragraphs "Radio," down to the paragraph commencing with the words "All of the Directors."

13. P. 1014, Exhibit 37, omit printing all except inside title page, title and paragraph "Taxation Suits on Members' Payments," (on p. 13 of exhibit), and title and paragraphs "Station WOW" (on pp. 35 and 36 of exhibit).

14. P. 1016, Exhibit 38, omit printing all of said exhibit except inside title page, title and paragraphs "Radio" (on p. 14 of exhibit), and title and paragraphs "New Mexico Tax on Payments" (on p. 15 of exhibit).

15. Omit printing pp. 1038 to 1049, both inclusive, for the reason that they pertain to extension of brief days and additional time for oral argument.

16. Omit printing pp. 1138 to 1152, both inclusive, for the reason that said pages refer to proofs of service of notices of hearing on various motions.

17. Omit printing p. 1183, Financial Statement of National Surety Corporation, December 31, 1943, and Power of Attorney to Fred Liles, and cover endorsement of Power of Attorney attached to bond.

18. Omit printing p. 1194, Financial Statement of National Surety Corporation, December 31, 1943, and Power of Attorney to Fred Liles and cover endorsement of Power of Attorney attached to bond.

19. Omit printing praecipe.

20. Omit printing certificates of the Clerk of the Supreme Court of Nebraska found at the conclusion of Volumes I and II of the certified transcript of the record, for the reason that said certificate appears at the end of Volume III and is included in the printing.

[fol. 1202] 21. Omit printing of all briefs filed in the Supreme Court of Nebraska separately certified and transmitted with the certified transcript of the record.

Dated July 17, 1944.

Francis P. Matthews, Insurance Bldg., Omaha, Nebraska; Rainey T. Wells, Insurance Bldg., Omaha, Nebraska; Raymond M. Crossman, First National Bank Bldg., Omaha, Nebraska; Paul P. Massey, City National Bank Bldg., Omaha, Nebraska; William P. Kelley, Insurance Bldg, Omaha, Nebraska; Robert W. DeVoe, Bankers Life Building, Lincoln, Nebraska; Earl Cline, First National Bank Bldg., Lincoln, Nebraska; Attorneys for Petitioners.

[fol. 1203] The respondent, Homer H. Johnson, hereby joins in the execution of the foregoing stipulation for printing of the record, but renews his assertion heretofore made to petitioners that additional portions of the certified transcript of the record can be omitted from the printed record, which portions are not essential to a consideration of any questions properly presented by a petition for writ of certiorari. No petition for writ of certiorari has been submitted by petitioners to respondent, and respondent therefore has not designated and is now unable to designate specifically the additional portions of the record which he asserts can be omitted.

Dated July 17, 1944.

Don W. Stewart, 1412 Sharp Building, Lincoln, Nebraska; Ralph W. Slocum, 1023 Sharp Building, Lincoln, Nebraska, Attorneys for Respondent.

[fol. 1204] SUPREME COURT OF THE UNITED STATES
October Term, 1944

No. ——

RADIO STATION WOW, INC. (a Nebraska corporation), Woodmen of the World Life Insurance Society (a Nebraska corporation), De E. Bradshaw, T. E. Patterson, Farrar Newberry, William Ruess, W. C. Braden, R. E. Miller, Sterling C. Holston and John J. Gillin, Jr., Petitioners,

vs.

HOMER H. JOHNSON

ORDER

Upon consideration of the application of counsel for petitioners,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same hereby is, extended to and including October 24th, 1944.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 28th day of July, 1944.

[fol. 1205] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted. Counsel are requested to discuss in their briefs and on oral argument the questions: (1) whether the judgment is final within the meaning of Sec. 237(b) of the Judicial Code, and (2) whether the federal questions raised by the petition for certiorari were properly presented in the record. The Solicitor General is invited to file a brief *amicus curiae* if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 13 1944
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

FRANCIS P. MATTHEWS,
RAINEY T. WELLS,
MONROE OPPENHEIMER,
ROBERT E. SHER,
RAYMOND M. CROSSMAN,
EARL CLINE,
ROBERT W. DEVOE,
C. PETRUS PETERSON,
PAUL P. MASSEY,
WILLIAM P. KELLEY,

Counsel for Petitioners.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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Supreme Court of the United States

OCTOBER TERM, 1944

No.....

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

To the Hon. Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a petition for a Writ of Certiorari to review the judgment of the Supreme Court of Nebraska entered March 10, 1944, reversing the judgment of the District Court of Douglas County, Nebraska, in favor of petitioners and against respondent (R. 744) and the judgments entered May 26, 1944, denying rehearing (R. 794) and overruling the petitioners' motions to dismiss the action for lack of jurisdiction over the subject matter (R. 793). The decision below was by a divided court, four members voting in favor of reversal and three voting in favor of affirming the decision of the District Court (R. 761).

B.

JURISDICTION

The judgments of the Supreme Court of Nebraska, on rehearing, and overruling the motions to dismiss for lack of jurisdiction, were entered May 26, 1944, and its mandate stayed pending determination of this petition (R. 801, 803). By order of Associate Justice Robert H. Jackson dated July 28, 1944, the time for filing this petition was extended to and including October 24, 1944 (R. 813).

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied a title, right, privilege and immunity claimed

by petitioners under the Communications Act of 1934, particularly Sections 310 (b) and 402 (a) thereof. The authorities relied on to sustain such jurisdiction are *Texas & Pac Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, and *Lewis-Simas-Jones Co. v. So. Pac. Co.*, 283 U. S. 654, 75 L. Ed. 1333, 51 S. Ct. 592, and other cases cited in Part B of the supporting brief (pp. 18-21). The statement below that the jurisdictional issue had been "disclaimed" is not supported by the record or by the decisions of this Court. See discussion in Part B of the supporting brief (pp. 20-21).

C.

QUESTIONS PRESENTED

1. Whether the primary jurisdiction doctrine, applied to Section 310 (b) of the Communications Act of 1934, precludes the courts, in private litigation, from passing on the reasonableness or validity of transfers of radio broadcasting stations, until after consideration thereof has been given and decision rendered thereon by the Federal Communications Commission from the standpoint of the public interest.

2. Whether, in any event, jurisdiction over a suit to set aside, modify or review an assignment of a radio station license, and a lease of the station facilities, approved by the Commission, can be exercised by a state court or is restricted to the federal courts under Section 402 (a) of the Communications Act of 1934.

3. Whether, in this particular case, the judgments of the Supreme Court of Nebraska invaded the exclusive jurisdiction vested in the Federal Communications Commission under the provisions of the

Communications Act of 1934, and amendments thereto, by annulling in legal effect the orders of the Commission of December 15, 1942, and January 12, 1943.

4. If 3 is answered in the affirmative, whether the judgments of the Supreme Court of Nebraska deprived the petitioners of rights, titles, privileges, and immunities set up and claimed under a statute of the United States (Communications Act of 1934) and deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Whether, aside from the jurisdictional issues, the decisions below were contrary to the decisions of the Supreme Court of the United States, construing the Communications Act of 1934, by attributing valuable property interests to a radio station license in violation of the provisions of Sections 301 and 309 (b).

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE COMMUNICATIONS COMMISSION AND THE COURTS BELOW

This case presents a conflict between the authority and jurisdiction of the Federal Communications Commission and the United States District Courts, under the Communications Act of 1934, and the authority and jurisdiction of the Nebraska State Courts, with respect to the validity of assignments of radio station licenses, and the transfers of the physical facilities covered by such licenses.

(1) **The parties.** The respondent, Homer H. Johnson (plaintiff and appellant below), a certificate holder in Woodmen of the World Life Insurance Society, insti-

tuted this action on behalf of himself and all other certificate holders.

The petitioner, Woodmen of the World Life Insurance Society (defendant and appellee below), is a fraternal benefit society (R. 39, 40, Ex. 1, R. 41) having approximately 336,000 members, $136,000,000 of assets and $367,000,000 of insurance in force (R. 11, 59).

The individual petitioners (defendants and appellees below), except Gillin, are executive officers and directors of the Society, resident in Nebraska (R. 1, 60).

The petitioner, Radio Station WOW, Inc., (defendant and appellee below) is a Nebraska corporation (R. 1, 148) and the petitioner John J. Gillin, Jr. (defendant and appellee below), is its President and General Manager (R. 141, Ex. 12, R. 148, 157).

(2) **Nature of action.** This suit was instituted to declare illegal and void and to cancel and terminate an assignment by Woodmen of the World Life Insurance Society to Radio Station WOW, Inc., of the license to operate the broadcasting facilities of Radio Station WOW, together with the lease executed by said Society of the facilities used in the exercise of the assigned license. The petition referred to proceedings pending before the Commission and alleged (a) lack of power in the board of directors of the Society to make the assignment and lease; (b) a scheme by the directors to enrich themselves by gaining control of the station "for a grossly inadequate consideration"; (c) that "no reasons have been disclosed for the leasing of the radio station other than set forth" in the application filed with

the Federal Communications Commission, which reasons "are obviously insufficient" (R. 6); (d) that the lease was "for a grossly inadequate rental and to a lessee without adequate financial responsibility" (R. 6); and (e) that the "purpose of the leasing of the station, as aforesaid, is to make the radio station available to the Consumers Public Power District and those interested in its acquiring * * * power facilities for spreading propaganda favoring such sale" (R. 9).

(3) **Proceedings before Commission.** On October 3, 1942, the Society entered into a 15-year lease of its radio station WOW at Omaha, Nebraska, constructed at a cost of approximately $175,000 (R. 581), to Radio Station WOW, Inc., at an average annual rental of approximately $74,000 (R. 756). The lease covered all of the lessor's radio buildings, equipment, and apparatus,[1] together with its contracts with the National Broadcasting Company and others "with reference to broadcasting commercial or other programs."[2]

This lease specifically provided:

> "This lease is to become effective and the term thereof shall commence as and when the Federal Communications Commission grants to the party of

1 The applicable language of paragraph 1 of the lease is as follows: "* * * all of the buildings, radio towers, electric plant, equipment and radio transmission facilities erected thereon, and all machinery, instruments, contrivances, apparatus, equipment, devices, tools and materials, consisting in part of transmitter and receiving equipment, control panels, transcribing equipment, microphones, grand pianos, electric organ, celesta, sound equipment, transmission, transcription equipment, electric fixtures, music library, motors, engine, loud speakers, radio receiving sets, cameras, mobile units and transmitter thereon, two supply units, portable transcribing equipment and all desks, tables, chairs, stands, filing cabinets and the household and personal property in the transmitter buildings, a more detailed description of which has been set forth in an inventory initialed by the parties hereto * * *." (R. 21, 22)

2 R. 22.

the second party a license to operate said ration station."[3]

The license was not in any manner included in the consideration for the lease and no other reference is made in the lease to the license.

On October 7, 1942, the lessor and lessee filed a joint application with the Federal Communications Commission for its consent to the assignment of the broadcasting license. The application, in accordance with the Commission's rules,[4] was accompanied by a copy of the lease contract and set forth the following data with regard to the finances of lessor and lessee, to justify and explain the proposed assignment: Complete inventory of station property; income statement of assignor; balance sheet of assignor (R. 386); the capital stock structure of the lessee by par value, voting power, number of shares issued and outstanding; the names and addresses of the lessee's incorporators, directors and officers (R. 394); the number and class of shares and percentage of issued stock owned or controlled by each stockholder in lessee; the beneficial ownership of such stock (R. 395); a balance sheet of the assignee corporation (R. 406).

On November 23, 1942, while the above application was pending before the Communications Commission, respondent instituted this action (R. 1) and alleged in his petition the pendency of said application before the Commission (R. 6).

On December 15, 1942, the Communications Commission, after receipt and consideration of the foregoing,

3 Paragraph 2 of Lease (R. 23).

4 Rules and Regulations, Federal Communications Commission, Sec. 1.364.

granted its consent in writing to the assignment. Under its terms "the consent of the Federal Communications Commission is hereby granted to the assignment of station license No. B4-S-686, dated 11-6-42 authorizing operation of the transmitting apparatus located at * * * 56th and Kansas Avenue, Omaha, Nebraska, from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc. * * *" (R. 661, Ex. 32, R. 662A). The order of the Commission provided further that "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith * * *."

On January 5, 1943, the Society and Radio Station WOW, Inc., filed a joint application with the Federal Communications Commission with copies of all pleadings in this action, as of that date, and prayed that the Commission enter an order extending the time within which their contract might be consummated and postponing the effective date of the previous order of December 15, 1942, until final adjudication of this action which was then pending in the District Court of Douglas County, Nebraska (R. 665, 666, Ex. 33, R. 667).

Respondent, however, even after such joint application was filed, failed to take any steps to intervene in the proceedings before the Commission. Thereafter, on January 12, 1943, the Commission entered an order denying this joint application (R. 663, Ex. 34, R. 664). This

made effective the assignment and lease between the parties (R. 21, 23, Ex. 13, R. 163).

In this action Radio Station WOW, Inc., and Gillin moved to strike from the plaintiff's petition a part of Paragraph 9, upon the ground, inter alia:

> "* * * *that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission.*" (R. 785)

This motion was overruled by the Trial Court (R. 791) and Radio Station WOW, Inc., and Gillin thereupon filed an answer denying the allegations of any fraud; denying any connection between the two corporations; alleging the adequacy of the lease considerations; and joining issues with the respondent (R. 28). In said answer it was alleged in Paragraph IX(c) (R. 31) that Radio Station WOW, Inc., has been since January 14, 1943, and is now:

> "* * * in possession of and operating the broadcasting station under and by virtue of the lease hereinbefore referred to and orders of the Federal Communications Commission."

The other petitioners filed an answer and denied the inadequacy of the consideration and any fraud; alleged the adequacy of the lease considerations; and joined issues with the respondent (R. 11).

(4) **Grounds for decision below.** At the close of the trial in the District Court, the trial judge stated:

> "I do not think there is any fraud here: there isn't any evidence of any fraud." (R. 730)

Thereupon, judgment was entered dismissing the action (R. 735) from which respondent appealed to the Supreme Court of Nebraska (R. 740).

The Supreme Court of Nebraska found unanimously that there was *no actual fraud* by the officers and directors of the Society, and *that no officer or director would gain directly or indirectly* from the assignment of the license and lease of the station facilities. Four judges, however, held that the transaction should be set aside because of certain features of the arrangement which the Court regarded as constituting "legal or constructive fraud." Briefly summarized, the grounds of decision were: (a) that the lease was not "a good deal for the Society, because only $74,000 a year was being received from the assignee of the radio license;" (b) that the assignor's president "because of his close friendship for Gillin," the station manager, admittedly responsible for its success, "prompted the organization" of the assignee corporation by Gillin and his friends; (c) that "Gillin obtained a one-fourth interest in this 15-year lease * * * for a nominal investment and in addition thereto, in effect, a $25,000 bonus * * * ;" (d) that the Society in return "obtained an extremely excessive reduction in its income * * * and a lease the terms of which are grossly inadequate to protect it * * *," and (e) that there was "little security back of" the lease and assignment because of the capital stock structure of the assignee corporation (R. 745).

The judgment of the Supreme Court of Nebraska, entered March 10, 1944, directed inter alia that:

"The lease to the station, the lease to the space occupied by the station, and the transfer of the license to operate the station be vacated and set aside."

and:

"That the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to entering into the lease: * * *" (R. 744)

When the jurisdiction and power of the Federal Communications Commission were invaded in this action by the judgment and opinion of the Supreme Court of Nebraska, entered March 10, 1944, the petitioners filed in the Supreme Court of Nebraska on March 30, 1944, motions to dismiss the action challenging the state court's jurisdiction and asserting exclusive jurisdiction in the Federal Courts and the Federal Communications Commission (R. 775, R. 782).

These motions were overruled on May 26, 1944 (R. 793).

The petitioners also filed on March 30, 1944, motions for rehearing in the Supreme Court of Nebraska, reasserting that exclusive jurisdiction was vested in the Federal Courts and Federal Communications Commission (R. 769, R. 778). On May 26, 1944, these motions were overruled, rehearing denied, and judgment and opinion of March 10, 1944, adhered to (R. 794).

In its opinion on rehearing, the Court conceded that the power "to license a radio station, or to transfer, assign or annul such a license, is within the exclusive

jurisdiction of the Federal Communications Commission" (R. 794). The Court insisted, however, that such jurisdiction "does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto," that "the effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the Federal license being a question solely for the Federal Communications Commission" and "the fact that the property involved was used in a licensed business was an incident to the suit only" (R. 794).

E.

REASONS FOR GRANTING THE WRIT

(1) The court below cancelled a radio station lease which had been found unobjectionable and had been approved by the Federal Communications Commission. Its theory was that the decree affected merely private "property rights in a radio station," and "the fact that the property involved was used in a licensed business was an incident to the suit only" (R. 794). In so holding, the court invaded the jurisdiction of the Federal Communications Commission and of the Federal Courts under the provisions of the Communications Act of 1934.

(2) The court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction. It condemned as inadequate the very financial and managerial arrangements, and lease terms, found unobjection-

able by the Federal Communications Commission when it consented to the assignment.

(3) The primary jurisdiction doctrine applies to the functions of the Federal Communications Commission. It was the function and duty of the Federal Communications Commission to pass on the desirability, in the public interest, of the very elements of the lease and assignment condemned by the Nebraska Supreme Court as contrary to the private interests of the lessor. Respondent's remedy was to intervene before the Federal Communications Commission, and if dissatisfied with its ruling, institute an action before a special three-judge Federal Court under Section 402 (a) of the Act.

(4) Under Sections 301 and 309 (b) of the Act. radio channels are public property and incapable of private ownership. The decisions below, by attributing a private property value to the station license, are inconsistent with said sections and the decisions of this Court.

(5) The decisions below cannot be sustained as involving purely non-federal questions, and the court below assumed that federal questions were involved and decided them.

(6) The questions are of importance and substance. They involve nothing less than the power of the Federal Communications Commission effectively to control the transfer of radio stations. The rulings below, if allowed to stand, will encourage a multiplicity of suits and result in conflicting court decisions in a field where the public interest demands uniformity of administration through a single federal commission. The danger of such

litigation is accentuated by the keen competition caused by wartime restrictions on new equipment, as well as by the newly developed techniques of Frequency Modulation and Television.[5]

WHEREFORE, your petitioners pray that a Writ of Certiorari be granted under the seal of this Court directed to the Supreme Court of Nebraska, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and for such further relief as to this Court may seem proper.

Dated this 11th day of October, 1944.

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Supreme Court of the United States

October Term, 1944

No._____

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A.

OPINIONS BELOW

The judgment of the District Court of Douglas County, Nebraska (R. 735) is unreported. The majority opinion of the Supreme Court of Nebraska of March 10, 1944, is reported in 13 N. W. (2d) 556, and the minority opinion at page 564. The opinion of May 26, 1944, denying the motion for rehearing is reported in 14 N. W. (2d) 666.

B.

JURISDICTION

In addition to the statements and citations contained in the petition (supra) it is contended that the Supreme Court of the United States has jurisdiction to review the judgments in this case because:

1. The judgment of the Supreme Court of Nebraska entered March 10, 1944 (R. 744) as adhered to by the Court in its judgment of May 26, 1944, overruling the motions for rehearing (R. 794) and the order entered on the same day overruling the motions to dismiss the action (R. 793) constitute a final judgment.

Dept. of Banking, State of Nebr. v. Pink, 317 U. S. 264, 87 L. Ed. 254, 63 S. Ct. 233.

Citizens Bank v. Opperman, 249 U. S. 448, 63 L. Ed. 701, 39 S. Ct. 330.

2. The judgment of the Supreme Court of Nebraska reversed the judgment of the District Court of Douglas County with directions, but leaving no

judicial discretion in the lower Court, and was therefore final in form, and thereby became reviewable by the Supreme Court of the United States without awaiting the formality of the ministerial entry of judgment upon the mandate by the lower Court.

Winthrop Iron Co. et al v. Meeker, et al, 109 U. S. 180, 27 L. Ed. 898, 3 S. Ct. 111.

Victor Talking Machine Co. v. George, 69 Fed. (2d) 871.

3. The judgments sought to be reviewed are by the highest Court of the State of Nebraska in which a decision could be had.

Art. V, Sec. 1, Const. of Nebr.

4. The Federal questions sought to be reviewed were properly raised and preserved in the Courts of Nebraska by:

(a) Motion and answer in the District Court and by motions to dismiss and for rehearing in the Supreme Court (R. 28, 785, R. 775, 782, 769, 778).

(b) A federal question may be advanced for the first time in a motion for rehearing if the state court entertains the same. The Supreme Court of Nebraska assumed and conceded that Federal questions were involved, had been raised and presented by petitioners, and said Court considered and decided said questions (R. 794).

Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene Co., 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48.

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145;

Illinois Cent. R. Co. v. Kentucky, 218 U. S. 551, 54 L. Ed. 1147, 31 S. Ct. 95.

Mallett et al v. No. Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 S. Ct. 730.

McKay v. Kalyton, 204 U. S. 458, 463, 51 L. Ed. 566, 569, 27 S. Ct. 346.

Grannis v. Ordean et al, 234 U. S. 385, 392, 58 L. Ed. 1363, 1368, 34 S. Ct. 779.

5. The decision below denied a title, right, privilege or immunity claimed by petitioners under Sections 310 (b) and 402 (a) of the Communications Act of 1934.

6. The judgment of the Supreme Court of Nebraska does not rest upon a non-federal ground which independently and adequately supports its judgments (R. 744, R. 794). The Supreme Court of the United States has jurisdiction to review a decision of a state court involving both a federal and non-federal ground where the non-federal ground is so interwoven with the federal ground as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without a decision of the other ground.

Abie State Bank v. Charles W. Bryan, Governor, et al, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

State Tax Commission of Utah, et al, v. W. Q. VanCott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605.

Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois, ex rel, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341.

Atlantic Coast Line Railroad Co. v. J. H. Wharton et al, 207 U. S. 328, 52 L. Ed. 230, 28 S. Ct. 121.

7. The statement below that the issue of jurisdiction was "disclaimed" is not supported by the rec-

ord. The pleading relied on as such disclaimer was filed only by the Woodmen of the World Life Insurance Society, its officers and directors (R. 11, 21). Petitioners Radio Station WOW, Inc., and John J. Gillin, Jr., raised the jurisdictional question *in limine* by motion to strike (R. 785). They preserved their objections thereafter, by Paragraph IX (c) of their answer in the District Court (R. 31), and by their motion to dismiss (R. 782) and motion for rehearing (R. 778) in the Nebraska Supreme Court. *The issue being one of jurisdiction was not subject to waiver.*

United States et al v. Corrick et al, 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829.

United States et al v. Griffin et al, 303 U. S. 226, 82 L. Ed. 764, 58 S. Ct. 601.

Davis, Director General of Railroads, etc. v. Wechsler, 263 U. S. 22, 68 L. Ed. 143, 44 S. Ct. 13.

City of Gainesville v. Brown-Crummer Investment Co. et al, 277 U. S. 54, 72 L. Ed. 781, 48 S. Ct. 459.

Mitchell, Insurance Commissioner v. Maurer, et al, 293 U. S. 237, 79 L. Ed. 338, 55 S. Ct. 162.

8. The question presented is one of substance and importance, as is more fully stated under Part G. of this brief (infra. pp. 26-42).

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325.

Armour & Co. v. Alton Railroad Co., 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498.

Venner v. Mich. Central RR. Co., 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444.

C.

STATUTES INVOLVED

Sections 310 (b) and 402 (a) of the Communications Act of 1934, as amended, provide:

> "310 (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.
>
> "402 (a) The provisions of the Act of October 22, 1913, c. 32, (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act."

Other applicable sections of said Act are set forth in Appendix A (infra, pp. 45-47).

D.

STATEMENT

A full statement of the case has been given under the heading "D" in the Petition, and to avoid duplication is not repeated (pp. 4-12, supra).

E.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nebraska erred:

(1) In holding that the issue of its jurisdiction over the subject matter of the suit could be, or had been, waived.

(2) In cancelling the lease of the radio station without the consent of the Federal Communications Commission first having been given to a reassignment of the license to operate the facilities covered by such lease.

(3) In nullifying, through such cancellation of the radio station lease, the order of the Federal Communications Commission which licensed the lessee alone to operate such station in the public interest.

(4) In construing the jurisdiction of the Federal Communications Commission under Sections 309 (b) (2) and 310 (b) as applying only to transfers of licenses rather than as also including authority over transfers of the instrumentalities, facilities, apparatus and services covered by the license.

(5) In its opinion of May 26, 1944 (R. 794), by holding " * * * The fact that the property involved was used in a licensed business was an incident to the suit only."

(6) In adjudicating, under the guise of a finding of constructive fraud, such issues as adequacy of consideration and financial responsibility of the licensee, the determination of which is vested primarily in the Federal Communications Commission.

(7) In failing to recognize the primary jurisdiction of the Federal Communications Commission to determine the validity of the transactions involved from the standpoint of the interest of the listening public in the larger and more effective use of radio.

(8) In failing, because of the foregoing, to dismiss the suit.

(9) In attempting to coerce Radio Station WOW, Inc,. to return the license to the Society by directing it "to do all things necessary for that purpose," thereby seeking to accomplish indirectly that which said Court conceded it did not have jurisdiction to order directly (R. 744, 745).

(10) In invading the jurisdiction of the courts of the United States vested in said courts under the provisions of the Federal Communications Act, particularly Sec. 402 (a) of Title 47, U. S. C. A.

(11) In depriving petitioners, through the foregoing, of the rights, privileges and immunities vested in them under the Communications Act of 1934, as well as of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

F.

SUMMARY OF ARGUMENT

I. The judgment sought to be reviewed was final, federal questions were properly raised and were decided by the court, and did not rest upon an independently and adequately supported non-federal ground.

II. The court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction.

(a) The issues decided were of public as well as private concern.

(b) The primary jurisdiction doctrine applies to the Federal Communications Commission.

(c) Respondent had an adequate remedy before the Communications Commission and the United States Courts.

III. The order of the Commission could not be challenged except in the United States District Courts pursuant to Section 402 (a) of the Communications Act of 1934.

(a) A radio station license is not a mere incident to the facilities of a radio station.

(b) It is immaterial that the order of the Commission was permissive and not mandatory.

(c) The decision below can not be sustained as involving purely "non-federal" questions.

(d) Even in cases of actual fraud, the Federal Commnuications Commission must decide whether license cancellation is in the public interest.

IV. The decision was contrary to decisions of this court in attributing valuable property interests to a radio station license.

V. The case is of vital public importance.

G.

ARGUMENT

I.

The judgment sought to be reviewed was a final decision in a suit involving a case or controversy in the highest court of Nebraska in which a decision could be had, presented substantial federal questions properly raised, entertained, considered and decided by the Court, and did not rest upon an independently and adequately supported non-federal ground.

In *Winthrop Iron Co. et al v. Meeker et al*, 109 U. S. 180, 27 L. Ed. 898, 3 S. Ct. 111, the Court said:

> "The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill, which contemplated nothing more than rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed; * * *. The litigation of the parties as to the merits of the case is terminated, and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purposes of an appeal."

In *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48, the Court said:

> "The presentation, by a petition for reargument in the highest court of a state, of a contention that a constitutional right has been violated, will, where such contention was considered and explicitly overruled by the state court, give the Supreme Court of the United States jurisdiction to review the judgment of the state court."

In *Great Northern Railway Company v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145, the ruling announced by the Court is clearly stated in the syllabus:

> "The rule that a constitutional question first raised on motion for rehearing in a state appellate court comes too late to serve as a basis of review by the Supreme Court of the United States does not extend to cases where the constitutional question, however tardily raised, is considered and decided, or where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right."

The Court in the case of *Abie State Bank v. Chas. W. Bryan, Gov'r et al*, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252, stated:

> "The appellees insist that, reading together the syllabus and the text of the opinion (Old Colony Trust Co. v. Omaha, 230 U. S. 100, 116, 57 L. Ed. 1410, 1416, 33 S. Ct. 967), it appears that the supreme court, exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense. But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment."

In *Chicago, Burlington & Quincy Railway Co. v. People of the State of Illinois ex rel*, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341, the Court said:

> "• • • the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough

or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law."

II.

The Court, under the guise of a finding of constructive fraud, decided issues of public as well as private concern, over which the Communications Commission was vested by Congress with primary jurisdiction.

(a) **The issues decided were of public as well as private concern.** The decision below (R. 745) purported to be based on the following general conclusions:

(1) That the lease and assignment were not "a good deal for the Society";

(2) That the Society's president "because of his close friendship for Gillin" (the radio station manager who was admittedly responsible for its success) prompted the organization of the assignee corporation by Gillin and other friends;

(3) That "Gillin obtained a one-fourth interest in this 15-year lease * * * for a nominal investment

and in addition thereto, in effect, a $25,000 bonus * * *."

(4) The Society in return "obtained an extremely excessive reduction in its income * * * and a lease the terms of which are grossly inadequate to protect it * * *."

(5) That there was "little security" back of the lease and assignment because of the capital stock structure of the assignee corporation.

These conclusions, we submit, involved judgments on issues in which the public as well as the assignor and assignee were interested and over which the Federal Communications Commission had primary jurisdiction under Section 310 (b) of the Act. That section provides:

> "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted *shall not be transferred, assigned, or in any manner* either voluntarily or involuntarily *disposed of*, or indirectly by transfer of control of any corporation holding such license, to any person, *unless the Commission shall, after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing." (Italics ours.)

Under this section the Federal Communications Commission had a paramount concern, from the standpoint of the public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court, solely from the standpoint of supposed private rights.[6]

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6 47 U. S. C. A., Sec. 308 (b); *In Re The Traveler's Broadcasting Service Corp.*, 7 F. C. C. 504.

In *Heitmeyer v. Fed. Com. Com.*, 95 Fed. (2d) 91, the Court said:

> "In any event, the burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect, by any person within the classes proscribed by the statute."

Thus, the amount of rental payable by the assignee, Gillin's selection as its president and manager, the capital structure and assets of the assignee, and Gillin's stock interest therein, were all required to be set forth in the application filed with the Commission (supra, p. 7), together with a copy of the lease agreement; and the consent of the Commission to the assignment of the license was explicitly based "on the statements contained in, or made in connection with, the application" and on the further basis "that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith" (R. 662A).

There were no detailed findings, but it may be assumed that weight was given by the Commission to Gillin's continued management of the station, the rental figure included in the lease and the fact that ownership was being transferred from an insurance society, with interests in another field, to a corporation exclusively concerned with the broadcasting business. That these factors were considered by the Commission is a fair inference

from its prior decisions[7] and is certainly consistent with the scope of its recent general regulations.[8]

(b) **The primary jurisdiction doctrine applies to the Federal Communications Commission.** The primary jurisdiction doctrine, heretofore applied to functions of the Interstate Commerce Commission in the field of railroad rates,[9] and pipe line joint rate divisions,[10] the United States Shipping Board in the field of ocean rates,[11] and the Civil Aeronautics Board in the field of airplane flight regulations,[12] would seem equally applicable to the func-

7. *In the Matter of The WGAR Broadcasting Co.* (WGAR) 4 F. C. C. 540, 549 (transfer of control disapproved where the Commission found, "that no direct public benefit will result in the granting of the application, but that the stockholders will benefit privately from the financial arrangements"); *In the Matter of Bishop, Transferor, and Roosevelt, Transferee*, (KFJZ) 5 F. C. C. 301, 304 (transfer of control approved upon a finding that "the program service of Station KFJZ, as well as its technical operation, will be materially improved, thus raising its general standard of efficiency"); *In the Matter of Beverly Hills Broadcasting Corp.* (KMPC) 4 F. C. C. 250, 253, where a transfer was approved because of the experience of the transferee who was found peculiarly "qualified to own and operate a broadcast station" so that "a better public service will result therefrom"; *In the Matter of Lancaster Broadcasting Service, Inc.*, (WKJC) 2 F. C. C. 164 (transfer approved because it would result in a sounder financial position for the station); *In the Matter of Harold F. Gross*, (WJIM), *Assignor*, 6 F. C. C. 333, 335 (transfer approved because it would "eliminate a liability against the station"); *In the Matter of John P. Scripps, Assignor*, (KHUB) 9 F. C. C. 206, 207 (Assignment of License held in public interest where made by "one who owns both the daily newspapers in the community to one who has no newspaper interests in that city"); *In the Matter of Edward H. Butler, et al, Transferors*, 9 F. C. C. 141, 142 (transfer of control from one newspaper to another approved where it "would alleviate the concentration of control by the News over facilities for public expression and the moulding of public opinion in the community").

8 Cf. Chain Broadcasting Regulations, F. C. C. Regs. 3.101, et seq; *National Broadcasting Co. v. United States*, 319 U. S. 190, 87 L. Ed 1344, 63 S. Ct. 997.

9 *Armour & Co. v. Alton RR. Co.*, 312 U. S. 195, 85 L. Ed. 771, 61 S. Ct. 498; *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 84 L. Ed. 361, 60 S. Ct. 325.

10 *Marony et al v. Applegate et al*, 266 App. Div. 412, 42 N. Y. Supp. (2d) 768.

11 *United States Navigation Co. v. Cunard Steamship Co.*, 284 U. S. 474, 76 L. Ed. 408, 52 S. Ct. 247.

12 *Adler v. Chicago & Southern Airline, Inc.*, 41 F. Supp. 366.

tions vested in the Communications Commission under the Communications Act of 1934. Indeed, the doctrine seems especially applicable, since the Communications Act gave the Commission "not niggardly but expansive powers" in a field "the dominant characteristic of which was the rapid pace of its unfolding" and a need for special vigilance to "encourage the larger and more effective use of radio in the public interest."[13]

If the doctrine of primary jurisdiction extends to the Federal Communications Commission, it is clearly applicable to a representative suit such as the case at bar. A closely analogous case is the recent decision in *Marony et al v. Applegate et al*, 266 App. Div. 412, 42 N. Y. S. (2d) 768. A minority stockholder there sued the directors of a corporation for damages for constructive fraud based on allegedly unfair divisions of joint rates by the corporation and other pipe line carriers. The bill was dismissed until the Interstate Commerce Commission could first determine the preliminary question of what division of rates would be fair and reasonable.

Applying the doctrine here, we submit that it was the function and duty of the Federal Communications Commission to pass on the desirability, in the public interest, of the very elements of the lease and assignment condemned by the Nebraska Supreme Court as contrary to the private interests of the lessor.

(c) **Respondent had an adequate remedy before the Communications Commission and the United States**

13 *National Broadcasting Co. v. United States*, 319 U. S. 190, 219, 87 L. Ed. 1344, 63 S. Ct. 997.

Courts. Respondent's remedy was to intervene[14] before the Federal Communications Commission, and if dissatisfied with its ruling, institute an action before a special three-judge federal court in Nebraska under Section 402(a) of the Act.[15]

In *Federal Communications Commission v Columbia Broadcasting System of California*, 311 U. S 132, 85 L. Ed. 87, 61 S. Ct. 152, in considering the remedy for review of orders relating to the assignment or transfer of radio station licenses, this Court said:

> "Insofar as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. Barring the exceptions immediately to be noted, Sec. 402 (a) assimilates 'suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act' to the scheme of the Act of October 22, 1913 (38 Stat. at L. 208, 219, Chap. 32), pertaining to judicial review of orders of the Interstate Commerce Commission. Therefore as to the general class of orders dealt with by Sec. 402 (a) jurisdiction rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court."

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14 Rules & Regs., F. C. C., Sec. 134, and see decision of July 5, 1944, in which a minority stockholder of a proposed assignor was held entitled by the Commission *en banc* to intervene in proceedings for consent to a license assignment. (*In the Matter of the Application of Arde Bulova, et al, for Consent to Transfer Control of Wodam Corporation* (WOV), Docket No. 6598, Petition for Leave to Intervene by Richard E. O'Day.)

15 47 U. S. C. A., Sec. 402 (a); *Federal Communications Commission v. Columbia Broadcasting System of Cal.*, 311 U. S. 132, 85 L. Ed. 87, 61 S. Ct. 152; *Monocacy Broadcasting Co. v. Prall et al* 90 Fed. (2d) 421.

III.

The order of the Commission could not be challenged except in the United States District Courts pursuant to Section 402 (a) of the Communications Act.

For the reasons discussed above, we submit that the court below had no jurisdiction, the suit being, in effect, one to set aside an order of the Federal Communications Commission.

(a) **A radio station license is not a mere incident to the facilities of a radio station.** In its opinion filed May 26, 1944, adhering to the judgment of March 10, 1944 (R. 794), the Supreme Court of Nebraska stated that:

> "The fact that the property involved was used in a licensed business was an incident to the suit only."

This conclusion is plainly erroneous. It is the radio station with its physical equipment which is licensed. The wave length is merely assigned by the Federal Communications Commission to the radio station. Where public interest, convenience or necessity will not be served, the Federal Communications Commission can not only refuse to issue a license but can refuse to permit the construction of the station, because jurisdiction over the station, its transmitter, its aerials and other instrumentalities and facilities, and the license to operate, all vest exclusively in the Federal Communications Commission. The physical property used in the operation of the station and the license for operation are, both in fact and theory, inseparable.[16]

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[16] 47 U. S. C. A., Sec. 319; *Whitehurst v. Grimes*, 21 Fed. (2d) 787; *Fisher's Blend Station, Inc. v. Tax Comm. of the State of Wash.*, 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608.

Likewise, any contention that the Commission lacks jurisdiction over the physical facilities of a radio broadcasting station is unrealistic and unsound. The mere presence of these facilities within its geographical bounds cannot confer upon a state control over the facilities inconsistent with the paramount control of the Federal Communications Commission. So long as they are constituent parts of an operating radio broadcasting station they are subject to the provisions of the Communications Act of 1934, as amended, and to the jurisdiction of the Commission. (See Communications Act of 1934, Secs. 301, 303(c), and 303(q); Rules and Regulations, Secs. 3.41 to 3.64. See also Standards of Good Engineering Practice, pp. 36-76, inclusive.) To the extent that it constitutes an integral part of an existing radio station—whether it be a transmitter, antenna towers, studio equipment, etc.—its operation and use is subject to the rules and regulations of the Communications Commission, and permission must be obtained from that body to effect any change, whether in location or construction, which will in any way affect the operation of that station.

Typical of the many instances wherein authority over the physical property of a radio station is vested in the Federal Communications Commission are the following:

(1) Installation of new transmitting equipment,

(2) changes in location of existing transmitting equipment,

(3) changes in construction of existing transmitting equipment,

(4) installations of new antenna systems,

(5) changes in location of existing antenna systems,

(6) changes in construction of existing antenna systems,

(7) changes in location of main studios of stations,

(8) changes in types of tubes used in existing transmitter,

(9) changes in frequency control equipment and substitution of new crystals to effect changes in operating frequencies,

(10) changes in painting and illumination of antenna towers,

(11) operation with increased or reduced power.

Each of the foregoing instances illustrates the degree and extent to which the Commission has and exercises control and authority over the physical properties of radio broadcasting stations.

In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693, this Court, in considering an application for permission to move a radio transmitter and studios to a new locale, said:

> "We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended. * * * Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license."

(b) **It is immaterial that the order of the Commission was permissive and not mandatory.** From a jurisdic-

tional standpoint, it was no less an interference with the jurisdiction of the Commission for the court to prevent the assignee from operating the station than it would have been for the court to direct the assignor to resume operations. The decree nullified the order of the Commission by taking away from the license assigneee the very facilities which it was licensed to operate and cancelling the very lease arrangements on the basis of which the license was issued. In *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444, the Interstate Commerce Commission had issued a permissive order authorizing a railroad company to enter into joint arrangements for the purchase of locomotives. A minority stockholder filed suit in the state courts of Ohio to enjoin the railroad from carrying out these arrangements. In holding that such suit invaded the exclusive jurisdiction of the Commission, the court said:

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. *While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.* Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., 258 U. S. 377, 380, 382, 66 L. Ed. 671, 674, 675, 42 S. Ct. 349. Such a suit must be brought against the United States as the representative of the public and may be brought only in a Federal district court. Judicial Code, secs. 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 219; Illinois Central R. R. Co. v. State Public Utilities Commission, 245 U. S. 493, 504-505, 62 L. Ed. 425, 436, 437, P. U. R. 1918C, 279, 38 S. Ct. 170; North Dakota v. Chicago & Northwestern Ry. Co. et al, 257 U. S. 485, 487, 66 L.

Ed. 329, 42 S. Ct. 170; Texas v. Interstate Commerce Commission, 258 U. S. 158, 164, 66 L. Ed. 531, 537, 42 S. Ct. 261; Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., supra. *That the order is not mandatory, but permissive, makes no difference in this regard.* Chicago Junction case (Baltimore & O. R. Co. v. United States), 264 U. S. 258, 263, 68 L. Ed. 667, 673, 44 S. Ct. 317. And as the State Court was without jurisdiction the Federal Court acquired none by the removal. Lambert Run Coal Co. v. Baltimore & O. R. Co., supra."[17] (Italics ours.)

(c) **The decision below can not be sustained as involving purely "non-federal" questions.** The court below, although it finds "constructive fraud," actually decided in petitioners' favor on every purely non-federal ground for challenging the validity of the lease. The court below agreed (1) that the board of directors had the power and authority to enter into and authorize the execution of the lease; (2) that no officer or director of the Society had any interest in the assignee corporation; (3) that there was no actual fraud on the part of any officer or director of the Society; and (4) that even as to "constructive fraud" only the officers and directors of the Society, and not the assignee corporation, were chargeable therewith (R. 745). It is impossible, therefore, to explain the decision below as involving a purely private controversy over questions of state law. *Despite the misleading verbiage of "constructive fraud" the decision below was plainly based on financial and managerial aspects of the station lease and assignment of license within the primary jurisdiction of the Federal Communications Commission and upon which the Commission acted.*

17 For later cases on the same point see *So. Pac. Co. v. City of Willow Glen*, 49 Fed. (2d) 1005, 1007.

(d) **Even in cases of actual fraud, the Federal Communications Commission must decide whether license cancellation is in the public interest.** As set forth above, both courts below found no actual fraud, and only a bare majority of the Supreme Court of Nebraska found so-called "constructive fraud." However, even if actual fraud could have been proven, it was still within the province of the Communications Commission to decide that the public interest would not be served by setting aside the transfer. Thus, In the Matter of the Revocation of License of the Panama City Broadcasting Co. (WDLP) 9 F. C. C. 208, a radio license had been obtained through deliberate fraud and deceit upon the Communications Commission by agents of the real party in interest. It was conceded that the deception was deliberate and inexcusable, and for this reason a minority of the Commission was of the view that the license should be revoked. A majority of the Commission, however, held that notwithstanding the fraud, the public interest would not be served by revoking the license. The Commission said (pp. 218, 219):

> "Having decided that Mr. Perry is not personally disqualified by the culpable conduct of his agents, we must next determine whether he has affirmatively demonstrated his fitness to continue to be the controlling stockholder in the respondent corporation.
>
> "His record of business achievement, his public spirited interest in civic and political affairs * * * all speak on his behalf. But the most important criterion is the public service being rendered by the station * * *.
>
> "We note in passing certain special circumstances applicable to this licensee arising out of the

war in which this Nation is now engaged. It is most important in war times to preserve the radio as a means of communicating with the public. It is unnecessary to mention all of the numerous services which radio performs in getting war-important messages to the public * * *. Also, by reason of the war, there is a severe shortage of materials with which to construct new stations or increase the coverage of existing ones. If we were to sustain the order of revocation against Panama City Broadcasting Co., the people of Panama City and Lynn Haven would certainly for a time be deprived of the wartime service which they now receive from station WDLP * * *. The loss could be remedied only after a considerable lapse of time and then only if satisfactory parties should apply for authority to supply service to the community and obtain the necessary equipment.

"The Commission thus concludes that public interest will be served by permitting Panama City Broadcasting Co. to continue as licensee of Station WDLP, with Mr. Perry as controlling stockholder (either directly or through controlled corporations), and that public interest will not be served by revoking the respondent's license."

IV.

The decision is contrary to decisions of this Court in attributing valuable property interests to a radio station license.

As a correlative to the primary jurisdiction considerations, it is significant that the decision below was based largely on a finding of inadequacy of consideration which, of necessity, must have attached to the Society's station license a substantial and valuable property interest. Otherwise, it is difficult to understand a finding

of gross inadequacy in an annual rental of $74,000 for a term of fifteen years for physical properties originally costing $175,000, which in turn had been considerably depreciated. It is apparent that, by thus attaching a substantial and valuable property right to the station license, the Nebraska court violated the provisions of Sections 301 and 309 (b) of the Act. As this court said in *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 84 L. Ed. 869, 60 S. Ct. 693:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."

V.

The case is of vital public importance.

To the public and to the Federal Communications Commission, representing the public interest, the decision below, if allowed to stand, presents the following dilemma:

The Insurance Society is given back all of the apparatus and physical equipment for Radio Station WOW, but without any license to operate it. Radio Station WOW, Inc. is left with a license to broadcast, but with no apparatus or physical equipment and with no way of obtaining new equipment for the duration of the war.

The Supreme Court of Nebraska did not concern itself with the solution or seriousness of this problem. In its second opinion (R. 794, 797), it said:

> "* * * It is true that the Federal Communications Commission may refuse to approve the reissuance of a license to the Woodmen of the World Life

Insurance Society. That is a hazard that every radio station operator must take. It is a matter that does not concern this court and is not involved in the decision of the case now before us. * * *"

The Federal Communications Commission will be forced now either to submit to the judgment of the Supreme Court of Nebraska (regardless of its prior decision and its opinion on the desirability of further operations by the Society), or deprive the people of the Middle West of the facilities of one of its major broadcasting stations. This, we submit, is a direct and flagrant interference with the jurisdiction and discretion of the Federal Communications Commission.

CONCLUSION

It is therefore respectfully submitted that the Writ of Certiorari should be granted and that the judgments of the Supreme Court of Nebraska should be reversed.

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Counsel for Petitioners.

Dated: October 11, 1944.

APPENDIX A.

Applicable sections of the Communications Act of 1934 (Chap. 5, Title 47, USCA) not quoted in the petition or brief:

"Sec. 152 (a) The provisions of this Chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; * * *."

"Sec. 153 (b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and service (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

"(d) 'Transmission of energy by radio' or 'radio transmission of energy' includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission."

"(k) 'Radio station' or 'station' means a station equipped to engage in radio communication or radio transmission of energy."

"Sec. 301. It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No

person shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter."

"Sec. 303. Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;"

"Sec. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

"Sec. 308 (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: * * *.

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; * * *."

"Sec. 309 (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or neces-

sity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding."

"(b) (2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter."

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Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

REPLY BRIEF OF PETITIONERS

FRANCIS P. MATTHEWS,
RAINEY T. WELLS,
MONROE OPPENHEIMER,
ROBERT E. SHER,
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.,

Petitioners,

v.

HOMER H. JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

REPLY BRIEF OF PETITIONERS

Introductory Statement

It is not intended nor considered necessary to submit an extended brief in reply to respondent's brief in opposition. It is desired, however, to challenge attention to admissions and to a significant omission in respondent's brief and to respondent's argument upon the question of jurisdiction of the subject matter.

I.

Respondent admits the issue presented has not been passed upon by this Court.

In their original petition and brief petitioners urged that "the physical property used in the operation of the station and the license for operation are, both in fact and theory, inseparable" (p. 34) and that this case was of vital public importance (p. 41) and substance (p. 13). This Court has never directly passed upon that question. This, respondent concedes, stating:

> "Nor have any cases been cited holding that the Communications Act vests in the Commission exclusive jurisdiction of *all* questions relating to radio broadcasting stations and equipment * * * ." (p. 29)

This suit involves directly the jurisdiction of the Communications Commission over the physical facilities of a radio broadcasting station as well as the broadcasting license and is therefore of substance and importance, not merely to the petitioners, but to the radio industry and the general public.

II.

Respondent admits purpose of this suit was to cancel the lease and the assignment of the license and that the Court below decreed such cancellation.

The brief of respondent, relying upon the second opinion of the Supreme Court of Nebraska (May 26, 1944, R. 794) claims that the court below conceded the jurisdiction of the Communications Commission over the license and exercised jurisdiction only over the lease and

physical properties as a matter of local law. Yet an analysis of respondent's brief demonstrates clearly that this was not the purpose of the suit, and the judgment of the court below had the necessary effect of nullifying the broadcasting license.

With respect to the purpose of the suit respondent stated in his brief on page 3:

> "On November 23, 1942, respondent, as a member of the lessor, commenced this action to cancel the lease and assignment of the license because they were procured by fraud from the lessor (R. 1-10)."

On page 8 respondent stated:

> "The purpose of the action was to cancel the lease of the radio station because it was procured by fraud, and also to cancel an assignment of the license to operate the station for the same reason (R. 1-10)."

On page 18 respondent stated:

> "Respondent brought the action to cancel a lease of a radio station and assignment of license to operate it because of fraud in procuring the license and assignment (R. 10)."

Obviously, the purpose of the suit which respondent instituted in the state court was to cancel the lease and the assignment of the broadcasting license. Respondent admits that the Supreme Court of Nebraska did this, stating on page 4, paragraph 9:

> "On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be cancelled (R. 744-745). * * *"

While respondent further states (p. 4):

> "On May 26, 1944, the court * * * filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license; that there never had been any contention to the contrary * * *."

The fact is that the judgment of May 26, 1944 (R. 794), adhered to the judgment of March 10, 1944 (R. 744).

The court's explanation of its judgment in its second opinion (R. 794), referred to in paragraph 12, page 4 of respondent's brief, does not dispose of petitioners' claim that in any event the court, in legal effect, cancelled the assignment of the broadcasting license.

It is immaterial whether the court below purported to cancel the transfer of the license directly or accomplished the same result indirectly by cancelling the lease of the facilities covered by the license. In either event, the effect is the same. The decision below invaded the exclusive jurisdiction of the Communications Commission.

III.

Respondent entirely ignores the applicability of Section 402 (a) of the Communications Act.

On page 5 of respondent's brief it is stated, "The only statute involved is Section 310 (b) of the Communications Act of 1934 * * *. Subsequent references to the Communications Act are to Section 310 (b) unless otherwise stated." There is no discussion whatever in respondent's brief of the controlling jurisdictional provisions of Section 402 (a) of the Communications Act. No authorities with reference to the section are cited. Respondent is content to dismiss consideration of Section

402 (a) in a short paragraph (pp. 21, 22) entitled, "Petitioners Have Not Shown Any Reason or Basis For Respondent to Intervene in Proceedings Before the Commission."

The principle that the orders of the Commission could be challenged only in the United States District Courts pursuant to Section 402 (a) of the Communications Act is discussed in petitioner's brief (pp. 32-38). That respondent had an adequate remedy before the Communications Commission and the United States Courts is clearly recognized by the decisions of this Court.

Federal Communications Commission v. Columbia Broadcasting System of California, 311 U. S. 132, 85 L. ed. 87, 61 S. Ct. 152.

Columbia Broadcasting System, Inc. v. U. S. A., et al., 316 U. S. 407, 86 L. ed. 1563, 62 S. Ct. 1194.

National Broadcasting Co., Inc., et al. v. U. S. A. et al, 316 U. S. 447, 86 L. ed. 1586, 62 S. Ct. 1214.

National Broadcasting Co., Inc., et al v. U. S. A., et al, 319 U. S. 190, 87 L. ed. 1344, 63 S. Ct. 997.

IV.

Respondent admits Federal (jurisdiction) question raised.

Respondent questions whether the motion and answer of the lessee raised the federal jurisdictional question (p. 9) but does not deny that petitioners' motions to dismiss and for rehearing raised the question of the lack of jurisdiction of the Nebraska Courts and asserted the exclusive

jurisdiction of the Communications Commission and the Federal Courts. In this respect, respondent merely urges that this question was raised *"for the first time"* in the motions to dismiss and for rehearing (pp. 4, 8, 11).

That a federal question may be advanced for the first time in a motion for rehearing if the state court entertains the same and considers and decides the question is well recognized and is discussed in the brief of petitioners (pp. 19, 26-28).

Respondent cites (p. 11) three cases which relate to whether a federal question was timely raised, but none of which refers to a federal question involving jurisdiction of the subject matter.

Respondent has failed to recognize the positive distinction existing between:

1. A federal question relating to the jurisdiction of a state court over the subject matter of the action, and

2. A federal question relating to a defense in an action in a state court where admittedly the state court has jurisdiction over the subject matter.

The federal question relating to jurisdiction over the subject matter can be raised at any time by any party to litigation, or if not raised by a party, it will be raised and considered by the court on its own motion.

United States et al, v. Corrick et al, 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829.

The cases cited by respondent (p. 11) are readily distinguishable:

1. *Louisville and Nashville Railroad Co. v. Woodford et al*, 234 U. S. 46, 58 L. Ed. 1202, 34 S. Ct. 739.

The action was originally in the state court of Kentucky to recover damages for the death of some and the injury to others of race horses in the course of railroad transportation. Admittedly the Kentucky Courts had jurisdiction over the subject matter of that action. Verdict and judgment were for the shipper and the railroad company appealed to the Appellate Court of Kentucky. After submission of the cause upon appeal the railroad company for the first time, as evidenced by the record, by supplemental brief, endeavored to inject the defense of a federal right to limit its liability by a written contract for the loss sustained by reason by its being an interstate shipment. This question did not go to the jurisdiction of the Kentucky courts over the subject matter and this Court held that the federal question was not properly or timely presented in the state court of Kentucky, and that, therefore, the federal question would not be considered.

2. *Missouri, Kansas & Texas Railway Co. v. Scaly et al*, 248 U. S. 363, 63 L. Ed. 296, 39 S. Ct. 97.

Likewise, this case involved no question of jurisdiction over the subject matter.

The case was brought in Kansas, involving an interstate shipment of grain from Kansas City, Missouri, to Galveston, Texas. The railway company defended on the ground that the transaction was governed by Missouri law. This contention was overruled, both in the trial court and in the Supreme Court of Kansas. After the

case had pended for eight years the railway company presented the claim that the transaction was governed by federal law. The Kansas Supreme Court held that the contention came too late to be considered. This Court held that the federal question was not seasonably raised.

3. *Herndon v. Georgia,* 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

This case was a criminal prosecution instituted under a section of the Penal Code of Georgia. The defendant was convicted and the conviction affirmed on appeal. The case was appealed to this Court and the statute assailed as contravening the due process clause of the Fourteenth Amendment. The constitutional question was not properly raised in the state court. This Court held that the federal question was not timely raised.

Respondent has overlooked a distinction between these cases and the case at bar, in two particulars:

1. The instant case involves directly the question of exclusive federal jurisdiction over the subject matter.

2. The federal question was considered and decided adversely to the contentions of the petitioners in the opinions and judgments of the court below on May 26, 1944 (R. 793-799).

The court below recognized the right of petitioners to raise the jurisdictional question in the motions to dismiss and the motions for rehearing, and considered and decided that question adversely to petitioners (R. 798).

That petitioners properly and timely raised the federal jurisdictional question in the court below is well

established by decisions of this Court cited and quoted in the brief of the petitioners (pp. 19, 20).

The universal rule followed by this Court is succinctly and definitely announced in the case of *McKay v. Kalyton*, 204 U. S. 458, 51 L. Ed. 566, 27 S. Ct. 346, cited in petitioners' brief. In that case this Court considered the manner and time of raising a federal question, not jurisdictional, to give this Court jurisdiction to review the decision of the court below, and stated:

> "It is contended that we are without jurisdiction because no title, right, or immunity was specially set up or claimed under any Federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an act or acts of Congress was expressly considered and denied by the state court. True it is that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623, 24 Sup. Ct. Rep. 390."

V.

Jurisdiction of the subject matter cannot be conferred or waived.

Petitioners' contention has been and is that the courts of Nebraska at no stage of the proceedings in this case had jurisdiction over the subject matter. No principle is more universally recognized and applied than that jurisdiction over the subject matter of an action cannot be

conferred upon a court or waived by pleadings, acts, or conduct of the parties. Jurisdiction over the subject matter is present or absent as a matter of law.

Yet, respondent urges in his brief (pp. 8-10), but cites no authorities, that the petitioner Society and its officers admitted jurisdiction in their answer; that all peitioners by their conduct sought the jurisdiction of the Nebraska Courts on the merits by asking affirmance of the trial Court judgment and that the lessor and lessee recognized the State Court jurisdiction by filing a joint application with the Communications Commission to extend the time for transferring to the lessee the Station and License "until final adjudication of the action pending in the District Court of Douglas County, Nebraska."

In *Mitchell, Insurance Commissioner v. Maurer et al,* 293 U. S. 237, 79 L. Ed. 338, 55 S. Ct. 162, this Court stated the general proposition in this language:

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction but also of that of the lower courts in a case under review."

In *Venner v. Michigan Central RR Co.,* 271 U. S. 127, 70 L. Ed. 868, 46 S. Ct. 444, this Court held that if a state court was without jurisdiction the federal court could acquire none by removal.

Finally this Court said in *United States et al v. Corrick et al,* 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829:

> "If the record discloses that the lower court was without jurisdiction, the Supreme Court will notice

the defect although the parties make no contention concerning it."

The Court below, in its opinion, May 26, 1944 (R. 794) recognized that the question of the lack of its jurisdiction over the subject matter and the question of exclusive jurisdiction of the Communications Commission over the subject matter were before the Court for consideration. These questions were considered, the jurisdiction of the court below sustained and jurisdiction of the Communications Commission denied, upon the theory that the question of jurisdiction "was eliminated from the case by the pleadings they (petitioners) filed in their own behalf," (R. 794) or in other words, that the petitioners had conceded jurisdiction of the state court over the subject matter.

Not only did the court below refuse to recognize and follow the decisions of this Court, but it departed from its own decisions that an objection to jurisdiction could be raised at any time. *In re Hansen's Estate*, 117 Neb. 551, 221 N. W. 694, the court below announced the rule in Nebraska to be:

> "An objection to the jurisdiction over the subject matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal."

CONCLUSION

We respectfully submit that the petition for a Writ of Certiorari and the briefs of petitioners and respondent disclose a federal question of substance and importance,

properly and timely raised, and considered and adversely decided by the court below to petitioners, which this Court by the issuance of a Writ of Certiorari should fully hear and determine.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.

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v.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation, DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.
Petitioners

v.

HOMER H. JOHNSON
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

This case is here on certiorari to review the judgment of the Supreme Court of Nebraska entered March 10, 1944, reversing the judgment of the District Court of Douglas County, Nebraska, in favor of petitioners (R. 744) and the judgments entered May 26, 1944, denying rehearing (R. 794) and overruling petitioners' motions to dismiss for lack of jurisdiction over the subject matter (R. 793). The Supreme Court of Nebraska divided four to three in reversing the decision of the District Court (R. 745, 761).

OPINIONS BELOW

The judgment of the District Court of Douglas County, Nebraska is unreported (oral opinion at R. 730; and decree at R. 735).

The majority opinion of the Supreme Court of Nebraska of March 10, 1944, is reported in 13 N.W. (2d) 556 (1944) (R. 745), and the minority opinion at page 564 (R. 761).

The opinion of May 26, 1944, denying the motion for rehearing is reported in 14 N.W. (2d) 666 (1944) (R. 794).

JURISDICTION

The judgments on rehearing and overruling the motions to dismiss for lack of jurisdiction were entered May 26, 1944. Certiorari was granted December 11, 1944. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decisions below denied a title, right, privilege, and immunity claimed by petitioners under the Communications Act of 1934, particularly Sections 310(b) and 402(a) thereof.

The judgments below were final, and the federal questions were properly presented. See Parts I and II of Argument (*infra*, pp. 17 to 29).

QUESTIONS PRESENTED

1. Whether the judgment below was final within the meaning of Section 237(b) of the Judicial Code.

2. Whether the federal questions were properly presented below.

3. Whether jurisdiction over a suit to set aside, modify or review an assignment of a radio station license, and a lease of the station facilities, approved by the Commission, can be exercised by a State court in view of Section 402(a) of the Communications Act of 1934.

4. Whether the primary jurisdiction doctrine, applied to Section 310(b) of the Communications Act of 1934 precludes the courts, in private litigation, from passing on the reasonableness or validity of transfers of radio broadcasting stations, after consideration thereof has been given and decision rendered thereon by the Commission from the standpoint of the public interest.

5. Whether, in this particular case, the judgments of the Supreme Court of Nebraska invaded the jurisdiction vested in the Federal Communications Commission under the provisions of the Communications Act of 1934, by annulling the orders of the Commission of December 15, 1942, and January 12, 1943, and by deciding matters affecting the public interest.

6. Whether the judgments of the Supreme Court of Nebraska deprived the petitioners of rights, titles, privileges and immunities set up and claimed under a statute of the United States (Communications Act of 1934) and deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the decisions below violated the Communications Act of 1934, by attributing valuable property interests to a radio station license in violation of the provisions of Sections 301 and 309(b).

STATUTES INVOLVED

Sections 310(b) and 402(a) of the Communications Act of 1934, as amended, provide:

> "310(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.
>
> "402(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend

any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act."

Other applicable sections of the act are set forth in Appendix A, *infra*, p. 80 *et seq.*

STATEMENT OF THE CASE

The Parties

1. The respondent, Homer H. Johnson (plaintiff and appellant below) who holds a life insurance certificate in the Woodmen of the World Life Insurance Society, instituted this action on behalf of himself and all other members. No other members have joined.

2. The petitioner, Woodmen of the World Life Insurance Society (defendant and appellee below), is a fraternal benefit society (Ex. 1, R. 40, 41) having approximately 336,000 members, $136,000,000 of assets and $367,000,000 of insurance in force (R. 11, 59).

3. The individual petitioners (defendants and appellees below), except Gillin, are executive officers and directors of the Society, resident in Nebraska (R. 1-2, 60).

4. The petitioner, Radio Station WOW, Inc. (defendant and appellee below) is a Nebraska corporation (R. 1, Ex. 12, R. 148) and the petitioner John J. Gillin, Jr., (defendant and appellee below), is its President and General Manager (R. 141, Ex. 12, R. 148, 157).

Lease of the Station

The Society originally constructed and owned and operated Radio Station WOW from 1923 to 1942 (R. 353-

362). The present facilities were constructed in 1934 pursuant to a construction permit from the Federal Communications Commission at a cost of approximately $175,000, all of which has been written off in prior years (R. 451).

On October 3, 1942, the Society entered into a 15-year lease of the radio station (Ex. 1, R. 21, 22), to Radio Station WOW, Inc., at an average annual rental of approximately $74,000 (Ex. 1, R. 21, 22, 756), and other substantial considerations. The lease covered all of the lessor's radio buildings, its studio equipment, and its transmitting structure and apparatus, together with its contracts with the National Broadcasting Company and others "with reference to broadcasting commercial or other programs" (R. 21-23).

This lease specifically provided:

> "This lease is to become effective and the term thereof shall commence as and when the Federal Communications Commission grants to the party of the second part a license to operate said radio station" (R. 23).

Nature of the Action

This suit was instituted November 23, 1942, to declare illegal and void and to cancel an assignment by the Society to the lessee of the license to operate the broadcasting facilities of Radio Station WOW and the lease of the facilities used by the Society in the exercise of the assigned license. The petition (R. 1), after identifying the parties and describing the radio station and its contractual and fiscal status, identifies the officers of the Society, including those managing the radio station, and sets forth their various salaries from the Society and the station, and alleges the profitable nature of the radio station's operations. In conclusory form is set forth the allegedly unlawful plan of the officers to transfer the station to the lessee, Radio Station WOW, Inc. The organization of the lessee corporation is described, its officers identified, and certain provisions of the lease set forth.

It is then alleged that:

> "On or about October 7, 1942, an application was filed with the Federal Communications Commission of the United States of America by defendant Bradshaw on behalf of the Society and defendant Gillin on behalf of defendant Radio Station WOW, Inc., requesting consent to the assignment by the Society to defendant radio station WOW Inc. of the license of radio station WOW. The reason given for such assignment was that the Society was convinced that defendant Radio Station WOW, Inc. would 'continue to serve the public by rendering a high type program service'." (R. 5-6).

It is further alleged that said application was then pending before the Federal Communications Commission and objections to the granting of consent to the aforesaid assignment of the radio station without a public hearing had been made by Honorable Dan Butler, Mayor of the city of Omaha, Nebraska, "*for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska*" (R. 6).[1]

It is alleged that "No reasons have been disclosed for the leasing of the radio station other than set forth in the aforesaid application *and such reasons are obviously insufficient*" (R. 6).

The petition further alleges "*The obvious purpose* of the leasing of the station as aforesaid is to make the radio station available to the Consumers' Public Power District and those interested in its acquiring such power facilities *for spreading propaganda* favoring such sale" (R. 9).

There follows the allegation that this proposed use of the radio station as a propaganda mechanism to promote the sale of private power facilities to public ownership groups is contrary to the private interest of the Society "*and to the listeners of the station and to the public generally*" (R. 9).

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[1] All italics herein are supplied.

The petition describes the various officers of the lessee corporation, alleging various connections with and attitudes toward the Consumers' Public Power District and alleges:

> "Defendant Radio Station WOW, Inc. is dominated and controlled by men who have been and now are directly or indirectly connected with the Consumers' Public Power District of Nebraska, or are personally interested in its acquisition of the power facilities serving Omaha, Nebraska and vicinity which are now owned and operated by the Nebraska Power Company" (R. 7).

The petition alleges that the acts of the officers and directors of the Society were "wrongful and unlawful" (R. 10), and that the plan for the transfer of the radio station was "to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of radio station WOW for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose . . ." (R. 4). Except for such conclusory allegations, the petition contains no allegation of fraud or constructive fraud, or any specific allegation as to how the officers and directors of the Society were to benefit from the transaction, except possibly by such benefits as might come to them, as to other citizens, in the alleged proposed use of the radio station in promoting public power operations.

The petition alleges the profitable operations and great value of the radio station, and complains that the lessee lacks financial stability to make its obligations to the Society secure (R. 3, 7).

The petition also alleges the failure of the officers of the Society to notify the membership of the proposed transfer at "a grossly inadequate consideration" and "to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to the Consumers' Public Power District" (R. 9).

Finally, the petition prays

> "... that the aforesaid lease and assignment of license by the Society of its radio station to defendant Radio Station WOW, Inc. be declared illegal and void and the aforesaid lease and assignment be immediately cancelled and terminated; that the defendants be enjoined from transferring by lease, assignment or otherwise, radio station WOW or its license thereto ..." (R. 10).

Orders of the Federal Communications Commission

On October 7, 1942, 47 days before the institution of this suit in the District Court of Douglas County, the Society and lessee had filed a joint application with the Commission for its consent to the assignment of the broadcasting license. The application (R. 376), in accordance with the Commission's rules,[2] was accompanied by a copy of the lease contract and set forth the following data with regard to the finances of Society and lessee, to justify and explain the proposed assignment: complete inventory of station property (R. 386); income statement of Society (R. 386) (Appendix D, *infra*, p. 102), balance sheet of Society (R. 386) (Appendix D, *infra*, p. 95); the capital stock structure of the lessee by par value, voting power, number of shares issued and outstanding (R. 394-396); and prices paid therefor (R. 394); the names and addresses of the lessee's incorporators, directors and officers (R. 394-395); the number and class of shares and percentage of issued stock owned or controlled by each stockholder in lessee (R. 395); the beneficial ownership of such stock (R. 395); and a balance sheet of the lessee corporation (R. 406); (Appendix E, *infra*, p. 104).

In addition to the income statement of Society thus filed with the application (R. 386) (Appendix D, *infra*, p. 102), it had, of course, been required to submit annually before March 1, of each year a balance sheet and income statement.[3]

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[2] Rules and Regulations, Federal Communications Commission, Sec. 1.364.

[3] *Ibid.*, Sec. 1.361.

In addition to this financial data, the application, in accordance with the Commission's Rules and Regulations, contained further information with regard to the assignee's interests in, or connection with any other radio station or any business enterprise not disclosed on the assignee's balance sheet (R. 403), a detailed analysis of the proposed service to be provided by assignee, including the number of hours to be devoted to various types of programs (R. 404), copies of typical daily programs, showing the character of service proposed to be rendered, that assignee expected to obtain programs from the NBC chain, that 52% of total time proposed to be used would be for chain programs, and 20% for mechanical reproduction (R. 404), etc.

On November 23, 1942, while the above application was pending before the Commission, respondent instituted this action (R. 1) *and alleged in his petition the pendency of said application before the Commission* (R. 6).

On December 15, 1942, the Commission, after consideration of the application, supporting documents and evidence, granted its consent in writing to the assignment. Under its terms

> "The consent of the Federal Communications Commission is hereby granted to the assignment of station license No. B4-S-686, dated 11-6-42 authorizing operation of the transmitting apparatus located at No. 56 and Kansas Avenue, Omaha, Nebraska, from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc. under authority of the Communications Act of 1934" (Ex. 32, R. 660-661, 662A).

The order of the Commission provided further that

> "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith . . ." (R. 662A).

On January 5, 1943, the Society and Radio Station WOW, Inc. filed a joint application with the Commission with copies of all pleadings in this action as of that date, and prayed that the Commission enter an order extending the time within which their contract might be consummated and postponing the effective date of the previous order of December 15, 1942, until final adjudication of this action (Ex. 33, R. 664-666, 667).

Thereafter, on January 12, 1943, the Commission entered an order denying this joint application (Ex. 34, R. 663, 664). This made effective the assignment and lease between the parties (Ex. 1, R. 21, 23, Ex. 13, R. 163-164), and the station was transferred accordingly.

Respondent did not at any time take any steps to intervene or set up his claims in any proceedings had before the Commission, although he alleged in his petition the pendency of the proceedings and the insufficiency of the showing made before the Commission (R. 5-6).

The pleadings in which the federal questions were raised in the trial court are discussed in detail in Part II (A) of the Argument (*infra*, pp. 20-23).

Decision of the Trial Court

At the conclusion of the trial the trial court, on March 9, 1943, announced its opinion from the bench as follows:

> "In the first place, I do not think there is any fraud here: there isn't any evidence of any fraud.
>
> "I don't think that the charges made with reference to the public service company have been substantiated; there has not been any evidence at all on that.
>
> "Now, taking into account those facts, I do not believe I would be justified in entering a decree setting aside this lease. And if you will, prepare a decree along that line" (R. 730).

Thereafter, the trial court entered its final decree on March 15, 1943, in which it made specific findings on the

factual issues in favor of petitioners and ordered the action dismissed with costs (R. 735-737).

First Opinion of the Supreme Court of Nebraska

In its first opinion filed March 10, 1944, the Supreme Court of Nebraska found unanimously that there was *no actual fraud* by the officers and directors of the Society, and *that no officer or director would gain directly or indirectly* by the assignment of the license and by the lease of the station facilities (R. 745, 754-755). Four justices, however, with three dissenting, held that the assignment of the license and the lease of the station facilities should be set aside because of certain features of the transactions which the court termed "legal or constructive fraud" (R. 755).

The purported grounds of the decision are discussed *infra*, pp. 44-60.

First Judgment of the Supreme Court of Nebraska

On the same date, March 10, 1944, the Supreme Court of Nebraska reversed the lower court and directed:

> ". . . The lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside. . . ."

and

> ". . . That the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to entering into the lease . . ." (R. 745).

Raising of the Federal Questions in the Supreme Court of Nebraska by Petitioners

When the jurisdiction of the Commission was invaded by the judgment of March 10, 1944, the petitioners filed in the Supreme Court of Nebraska on March 30, 1944, motions

to dismiss the action challenging the State court's jurisdiction and asserting exclusive jurisdiction of the Commission and the Federal courts (R. 775-776, 782).

These motions were overruled on May 26, 1944 (R. 793).

The petitioners also filed on March 30, 1944, motions for rehearing in the Supreme Court of Nebraska, reasserting that exclusive jurisdiction was vested in the Federal courts and Federal Communications Commission (R. 769, 778). On May 26, 1944, these motions were overruled, rehearing denied, and judgment and opinion of March 10, 1944, adhered to (R. 794).

The Second Opinion and Judgment of the Supreme Court of Nebraska

In its opinion on rehearing, on May 26, 1944, the court conceded that the power "to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission" (R. 797). The court insisted, however, that such jurisdiction "does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto," that "The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission" (R. 797) and "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

Despite this language the court adhered to its former judgment (R. 794).

The effect of the Court's decree is discussed *infra*, pp. 60-65.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nebraska erred:

1. In holding that the issue of its jurisdiction over the subject matter of the suit was eliminated from the case by the pleadings filed by the petitioner Society.

2. In cancelling the lease of the radio station without the consent of the Federal Communications Commission first having been given to a reassignment of the license to operate the facilities covered by such lease.

3. In nullifying, through such cancellation of the radio station lease, the order of the Federal Communications Commission which licensed the lessee alone to operate such station in the public interest.

4. In construing the jurisdiction of the Federal Communications Commission under Sections 309(b)(2) and 310(b) as applying only to transfers of licenses rather than as also including authority over transfers of the instrumentalities, facilities, apparatus, and services covered by the license.

5. In its opinion of May 26, 1944 (R. 794), by holding: "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

6. In adjudicating, under the guise of a finding of constructive fraud, such issues as adequacy of consideration and financial responsibility of the lessee, the determination of which is vested in the Federal Communications Commission.

7. In failing to recognize the primary jurisdiction of the Federal Communications Commission to determine the validity of the transactions involved from the standpoint of the interest of the listening public in the larger and more effective use of radio.

8. In failing, because of the foregoing, to dismiss the suit.

9. In attempting to coerce Radio Station WOW, Inc. to return the license to the Society by directing it "to do all things necessary for that purpose" (R. 745), thereby seeking to accomplish indirectly that which said court conceded it did not have jurisdiction to order directly.

10. In invading the jurisdiction of the courts of the United States vested in said courts under the provisions of the Federal Communications Act, particularly Section 402(a).

11. In depriving petitioners, through the foregoing, of the rights, privileges and immunities vested in them under the Communications Act of 1934, as well as of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I

THE JUDGMENT OF THE NEBRASKA COURT WAS FINAL

The direction for an accounting is merely ancillary to the rescission of the lease which is the essence of the decree. Such rescission being effective immediately, the retention of jurisdiction pending completion of the ancillary accounting did not affect the finality of the judgment. *Forgay* v. *Conrad*, 6 How. 201; *Thompson* v. *Dean*, 7 Wall. 342; *Winthrop Iron Co* v. *Meeker*, 109 U.S. 180; *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U.S. 362; *Gulf Refining Co.* v. *United States*, 269 U.S. 125.

II

THE FEDERAL QUESTIONS WERE PROPERLY PRESENTED IN THE RECORD

Under the principle of clear intendment, the questions were adequately raised even in the trial court by the motion to strike and answer of Radio Station WOW, Inc. and Cillin, and the answer of the Society and its officers. *St. Louis, Iron Mountain & Southern Ry.* v. *Starbird*, 243 U.S. 592; *Green Bay & Mississippi Canal Co.* v. *Patton Paper Co.*, 172 U.S. 58. The statement of the Nebraska court that the federal questions were "eliminated from the case by the pleadings" is not supported by the record and is not controlling on this Court. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *First Natl. Bank* v. *Anderson*, 269 U.S. 341; *Davis* v. *Wechsler*, 263 U.S. 22.

Further, the questions could not be waived since they involved lack of jurisdiction over the subject matter. *Cf. United States* v. *Griffin*, 303 U.S. 226; *United States* v.

Corrick, 298 U.S. 435; *Green* v. *Obergfell*, 121 F.(2d) 46 (App.D.C. 1941); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F.(2d) 426 (App.D.C. 1938).

In any event, since the Nebraska Supreme Court considered and decided the federal questions, it is immaterial how they were raised in the trial court. *Fleming* v. *Fleming*, 264 U.S. 29; *Cissna* v. *Tennessee*, 246 U.S. 289; *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *McKay* v. *Kalyton*, 204 U.S. 458; *Mallet* v. *North Carolina*, 181 U.S. 589; *Nickey* v. *Mississippi*, 292 U.S. 393; *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23.

III

THE JUDGMENT INVADES THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION WITH RESPECT TO THE TRANSFER AND OPERATION OF RADIO STATION WOW

Broadcasting is heavily charged with a vital public interest. Its very nature makes federal control not only appropriate but essential, and its cultural, social and political significance subject it, in some respects, to greater obligations in the public interest than public utilities. This is evident from the language as well as the legislative history of the Communications Act. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *National Broadcasting Co.* v. *United States*, 319 U.S. 190. To protect the congressional scheme for regulating broadcasting in the public interest, the jurisdiction of the Commission to issue licenses, approve transfers and otherwise determine matters in the public interest must be jealously safeguarded against invasion by other tribunals, whatever the ground relied upon. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235 (App.D.C. 1938). This Court, of course, is not precluded by the language of the Nebraska court, but will review the record to determine whether the announced grounds in denying a federal right are of substance. *United States* v. *Pink*, 315 U.S. 203.

Although the decision is phrased in terms of "constructive fraud," an analysis of the petition (*infra*, pp. 40-43),

the evidence (*infra*, pp. 43-44), the opinion (*infra*, pp. 44-60) and the decree (*infra*, pp. 60-65) shows that it actually involved the decision of issues of public concern; and that the judgment, while purporting to deal only with the station "property" and not the "license," necessarily affected the one as fully as the other and nullified the license as well as the lease. The invasion of the Commission's jurisdiction, therefore, was direct and flagrant.

Every item relied on as contributing to the conclusion of "constructive fraud" was either exclusively, or predominantly, a public interest issue in which the Commission was directly concerned.

The judgment, therefore, because of the type of relief granted alone, prevents maintenance of this suit, whether on the ground that it sets aside and annuls the Commission's order, relief which can be granted only in a three-judge court under Section 402(a) of the act, or on the broader ground that congressional policy for the control of radio broadcasting cannot be thwarted by permitting courts to nullify administrative action taken in the public interest. *Venner* v. *Michigan Central R.R.*, 271 U.S. 127; *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377; *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F. Supp. 791 (D.Minn. 1934); *Hoard* v. *Chesapeake & Ohio Ry.*, 123 U.S. 222; *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492; *New York* v. *New York Central R.R.*, 275 N.Y. 287, 9 N.E.(2d) 931 (1937). And whether or not the type of relief granted by itself precludes maintenance of the suit, the reliance by the court, as essential grounds for its judgment, upon decision of public interest questions, falling within the primary jurisdiction of an expert tribunal to determine, necessarily made this a suit nullifying the Commission's action which could not be maintained in a State court. *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *Ford* v. *Oregon Electric Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); *Maroney* v. *Applegate*, 266 App. Div. 412, 42 N.Y.Supp.(2d) 768 (1943).

ARGUMENT

I

THE JUDGMENT OF THE SUPREME COURT OF NEBRASKA IS FINAL WITHIN THE MEANING OF SECTION 237(b) OF THE JUDICIAL CODE

Analyzed into its components, the judgment (R. 744, 745) contained seven directives:

(1) "... that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside;

(2) "that the $25,000 of accounts turned over by the society to lessee be returned;

(3) "that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society;

(4) "that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose;

(5) "that generally everything be done to restore the parties to their original position prior to the entering into the lease;

(6) "that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning the same to the society pursuant hereto are to be paid by the lessee;

(7) "... that all costs, both in this court and in the district court shall be paid by the defendants, except the Woodmen of the World Life Insurance Society."

None of these lacks finality. Even the third which orders an accounting is final under the decisions of this Court.

Forgay v. *Conrad*, 6 How. 201, would seem to be controlling. There the Circuit Court for the District of Louisiana, after hearing, had entered a decree setting aside as fraudulent a deed to certain lands and slaves. The court ordered the re-transfer of the lands and slaves to the complainant and ordered payment of certain monies by one of the defendants, concluding with a direction that the master (pp. 202-203) "take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants." A motion was filed to dismiss the appeal from this decree on the ground that such decree was not final, within the meaning of the acts of Congress of 1789 and 1803. Chief Justice Taney, in overruling the motion, said (p. 204):

> "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their reights. . . . And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

This principle is applicable to the case at bar. If petitioners must wait until an accounting has been had of the income and disbursements of the station while operated by the lessee, they will, in Justice Taney's words, "be subjected to irreparable injury," since the station will already have been taken out of the lessee's possession before petitioners have had "an opportunity of being heard in this court in defense of their rights."

To the same effect are the decisions of this Court in *Thomson* v. *Dean*, 7 Wall. 342, 343 (where a decree to transfer certain shares of stock was held final, although the order directed "that account be taken and stated as to the amount paid and to be paid for the stock, and as to dividends accrued, and to be credited under the contracts between the parties"); and in *Winthrop Iron Co.* v. *Meeker*, 109 U.S. 180 (where a decree setting aside a lease was held final although it directed an accounting before a master by the lessee company and its directors for all profits from the use of the leased property during the period of the lease, with a further accounting ordered by the defendant directors concerning ores mined by them and the royalty of such ores owing to the company). To like effect are *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U.S. 362; *Gulf Refining Co.* v. *United States*, 269 U.S. 125; *Knox Natl. Farm Loan Assn.* v. *Phillips*, 300 U.S. 194.

II

THE FEDERAL QUESTIONS WERE PROPERLY PRESENTED IN THE RECORD

We submit that the federal questions were properly presented for the following reasons: (a) the questions were adequately raised in the trial court under the principle of "clear intendment"; (b) in any event, the questions could not be waived since they involved jurisdiction over the subject matter; and (c) it is immaterial how the questions were raised in the trial court since the Supreme Court of Nebraska considered and decided them.

A. THE QUESTIONS WERE ADEQUATELY RAISED IN THE TRIAL COURT UNDER THE PRINCIPLE OF "CLEAR INTENDMENT"

Although it was not included in the record filed by respondent in the Supreme Court of Nebraska, the petitioners Radio Station WOW, Inc. and Gillin had filed a motion in the trial court for an order striking from the respondent's petition a part of paragraph 9 upon the ground:

> "... *that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission*" (R. 785, 786).

This motion had been overruled by the trial court (R. 791). At the time of the filing in the Supreme Court of Nebraska of motions for rehearing and motions to dismiss for lack of jurisdiction, the petitioners also filed a motion for leave to file a supplemental transcript setting forth this motion and the order of the trial court overruling the same (R. 785-791), which was denied without explanation, on April 5, 1944 (R. 791). This was prior to the oral argument on rehearing April 8, 1944 (R. 784-792).

Radio Station WOW, Inc., and Gillin, after the overruling of their motion to strike, filed an answer in which in paragraph IX (c) it was alleged with respect to the federal question (R. 31):

> "Admit the material allegations contained in subparagraph (c) of Paragraph Nine (IX) of the petition except 'that said application is now pending before the Federal Communications Commission.' As to this defendants allege that pursuant to orders issued by the Federal Communications Commission on December 15, 1942, and January 12, 1943, said application was in all respects approved and the defendant Society and defendant Radio Station WOW, Inc., authorized and directed to effectuate said assignment; that pursuant to said authorization

and direction and in accordance therewith and with the terms of the lease hereinafter referred to, possession of the leased premises was delivered by the defendant Society to defendant Radio Station WOW, Inc., at 11:00 o'clock P. M. Eastern War Time, January 14, 1943, and since said time defendant Radio Station WOW, Inc. has had the exclusive right to the use of the call letters 'WOW' and broadcasting frequency of 590 Kilocycles, and said defendant is now and since said date has been in possession of and operating the broadcasting station under and by virtue of the lease hereinbefore referred to and orders of the Federal Communications Commission."

Likewise, in paragraph 18 of their answer the Society and its officers alleged (R. 21):

"18. Defendants further allege that the Federal Communications Commission by virtue of the laws of the United States of America and its rules and regulations made pursuant thereto, has and concedes that it has no jurisdiction, over the subject matter of plaintiff's action, *except* jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer of said license to the defendant Radio Station WOW, Inc., and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found".

We respectfully submit that these pleadings constitute a sufficient claim that the Commission had exclusive jurisdiction over the assignment of the license and over the transfer of the facilities; that pursuant to the orders of the Commission the license had been assigned and the lease had

become effective; that possession of the leased property had been delivered to Radio Station WOW, Inc., and that since January 14, 1943, the station had been operated by the lessee under the orders of the Commission. Thus, the claim of federal jurisdiction was definitely set forth.

No particular form of words is essential to set up a federal right or claim. It is only required that the federal questions be brought to the attention of the Court. Where it appears from a fair reading of the pleading that the federal claim is based upon a particular Federal statute or authority, whether adverted to in terms or not, this Court will judicially notice such statute and consider it pleaded and raised.

In *St. Louis, Iron Mountain & Southern Ry.* v. *Starbird*, 243 U.S. 592, 598, the Court said:

> "The federal right is not required to be pleaded in any special or particular form. . . . 'That it is not necessary, that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*; but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment.'"

In *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 67-68, the Court said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Other decisions of this Court to the same effect are: *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Whitney* v. *California*, 274 U.S. 357, 360-361; *Powell* v. *Brunswick County*, 150 U.S. 433, 440.

That the statement of the Supreme Court of Nebraska that the federal question "was eliminated from the case by the pleadings" (R. 798) is not sustained by the pleadings. The language quoted by the court is lifted only from the answer of the Society and its officers. Such language nowhere appears in any pleading of WOW, Inc. and Gillin. Even as to the Society's answer, the opinion does not disclose that the statement the Commission had no jurisdiction was subject to the following exceptions:

> 1. ". . . jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer of said license to Radio Station WOW, Inc. . . ."
>
> 2. the "further order to the Society to execute and perform the provisions of said lease," and
>
> 3. ". . . by virtue of which possession of said leased property has now been delivered to the lessee" (R. 21).

Of course, the statement of the Nebraska court that the federal question had been eliminated is not controlling, this being an issue ultimately for decision by this court. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *First Natl. Bank* v. *Anderson*, 269 U.S. 341; *Davis* v. *Wechsler*, 263 U.S. 22.

B. THE QUESTIONS COULD NOT BE WAIVED SINCE THEY INVOLVED JURISDICTION OVER THE SUBJECT MATTER

In its second opinion the Supreme Court of Nebraska states: "The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume" (R. 798).

This refers to paragraph 18 of the Society's answer which, as shown above, explicitly excepted "jurisdiction to determine the transfer of the license to operate said radio station, . . . and [the] further order to the Society to execute and perform the provisions of said lease" (R. 21) as being vested in the Commission.

In any event, jurisdiction of the subject matter could not be acquired by the State courts by consent, acquiescence, or inadvertence of the parties. The principle was well stated by the Court of Appeals of the District of Columbia in *Woodmen of the World Life Insurance Association* v. *Federal Communications Commission*, 99 F.(2d) 122 (App. D.C. 1938), involving Section 402(b) of the Communications Act, where the court said:

> "Jurisdiction cannot be given to a court by consent, acquiescence or inadvertence. It can acquire jurisdiction only by authority of law. It is immaterial, therefore, what the situation may be 'as a practical matter'" (*ibid.*, p. 123).

This principle is further illustrated in *United States* v. *Griffin*, 303 U.S. 226; *United States* v. *Corrick*, 298 U.S. 435; *Green* v. *Obergfell*, 121 F.(2d) 46 (App.D.C. 1941); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F.(2d) 426 (App.D.C. 1938).

It is significant that the Nebraska court itself, in its opinion on rehearing recognized that lack of jurisdiction could be raised at any time (R. 798-799). That this is the well-settled rule in Nebraska is clear under *In re Hansen's Estate*, 117 Neb. 551, 221 N.W. 694 (1928), in which the court held that "an objection to the jurisdiction over the subject matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal" (*ibid.* at 551).

C. IT IS IMMATERIAL HOW THE QUESTIONS WERE RAISED IN THE TRIAL COURT SINCE THE SUPREME COURT OF NEBRASKA CONSIDERED AND DECIDED THE QUESTIONS

As set forth above, the federal questions were adequately raised in the trial court, within the clear intendment rule. In any event, what happened in the trial court is immaterial since all of the federal questions were explicitly raised in the Supreme Court of Nebraska by motions to dismiss and for rehearing, which motions were considered and decided on their merits.

The motion to dismiss of the Society, filed March 30, 1944, assigned the following reasons for dismissal:

> "1. The Court has no jurisdiction over the subject matter of this action.
>
> "2. This action involves the use of a channel of Radio transmission and a license therefor, and the control and jurisdiction of such is exclusively in the United States of America acting through and by the Federal Communications Commission by virtue of the provisions of Sub-Chapter I to Sub-Chapter VI inclusive of Chapter 5, Title 47 U. S. C. A.
>
> "3. Any person aggrieved, or whose interests are claimed to be adversely affected by any decision of the Federal Communications Commission, must proceed in accordance with the provisions of Sub-Chapter I to Sub-Chapter VI, inclusive, of Chapter 5, Title 47 U. S. C. A." (R. 775-776).

The motion for rehearing of the Society was filed March 30, 1944, and in it the federal questions were raised as follows (R. 769-771):

> "The order of the Court that '. . . the transfer of the license to operate the station be vacated and set aside . . .' (Maj. Op., p. 25),

and

> "'. . . that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose . . .'" (Maj. Op., p. 26),

is void and unenforceable for the following reasons:

> "1. Under the Act of Congress (47 U. S. C. A. Sub-Chapters I to VI inclusive of Chapter 5) creating the Federal Communications Commission and defining its jurisdiction and power, the issuance, assignment, transfer, surrender or revocation of all radio licenses is within the exclusive jurisdiction and power of the Federal Communications Commission.

"2. This Court has no jurisdiction or power to require or direct Radio Station WOW, Inc., to assign, surrender, cancel or transfer the radio license now held by it for the operation of Radio Station WOW, as jurisdiction over that subject matter is solely and exclusively within the jurisdiction and the power of the Federal Communications Commission.

"II

"This action is essentially one to annul or set aside an order of the Federal Communications Commission made under the provisions of Title 47, U. S. C. A., Subchapters I to VI inclusive of Chapter 5, and neither the District Court nor this Court ever acquired jurisdiction over the subject of this action.

"III

"This Court has no jurisdiction or power to decree that the lessee, Radio Station WOW, Inc., surrender or assign the radio license issued to it by the Federal Communications Commission, nor to require the Federal Communications Commission to consent to the assignment thereof to the Society, nor to require the Federal Communications Commission to issue a new radio license to the Society, nor to deprive the lessee of the continued use of its radio license.

"IV

"This Court being without jurisdiction or power to require the return of the radio license to the Society, the effect of the majority opinion of the Court is to revest the possession of the broadcasting equipment in the Society without a radio license to operate a radio station, leaving Radio Station WOW, Inc. with a radio license but without broadcasting equipment to enable it to operate a radio station.

"V

> "The judgment and opinion of this Court vacating and setting aside the transfer of the license to operate the Radio Station and ordering that the license to operate the Radio Station be returned to the Society and directing the lessee to do all things necessary for that purpose is void and unenforceable and contravenes and is repugnant to the Commerce clause of Section 8 of Article I of the Constitution of the United States and to Acts of the Congress of the United States, being the Communications Act of 1934 and amendments thereto, Subchapters I to VI, inclusive, of Chapter 5 of Title 47 of United States Code Annotated, in that exclusive jurisdiction over all the channels of interstate and foreign radio transmission and the use of such channels is vested in the United States, its Federal Communications Commission and its Courts."

The motions to dismiss and for rehearing were overruled May 26, 1944 (R. 793, 794).

Comparable motions filed by the petitioners WOW, Inc. and Gillin (R. 778, 782) in like manner were overruled May 26, 1944 (R. 793, 794).

In denying these motions, it is plain that the Nebraska Court considered and passed upon the federal questions. The opinion in the course of a lengthy discussion, concludes that

> ". . . the right of the Federal Communications Commission to license and to require compliance with the regulations of the commission does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto" (R. 797);

that while "true that the Federal Communications Commission may refuse to approve the reissuance of a license" to the Society (R. 797), that "does not concern this court and

is not involved in the decision of the case now before us"; that the denial of such reissuance of a license to the Society would leave it "in no different position than if it was obliged to take the station back under the express terms of the lease" (R. 797), that "The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit" and "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

In view of the foregoing, the Supreme Court of Nebraska, although stating that petitioners' position "was eliminated from the case by the pleadings they filed" also decided that: "*Their position is unsound on its merits . . .*" (R. 798).

The case, therefore, comes within the principle that if a State Supreme court considers and passes upon federal questions, even though these are first raised on motion for rehearing before that court, the federal question is properly raised so as to give jurisdiction to this Court under Sec. 237(b) of the Judicial Code. *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *Fleming* v. *Fleming*, 264 U.S. 29; *Cissna* v. *Tennessee*, 246 U.S. 289; *McKay* v. *Kalyton*, 204 U.S. 458; *Mallett* v. *North Carolina*, 181 U.S. 589. See also: *Nickey* v. *Mississippi*, 292 U.S. 393. The length of the discussion in the State court is immaterial, *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23. Nor is there any independent non-federal ground to sustain the judgment below. It is well settled that where a non-federal ground for a decision is so interwoven with the federal ground as not to be independent and of sufficient breadth to sustain a judgment without a decision of the other ground, the jurisdiction of this Court is plain. *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157; *State Tax Comm.* v. *Van Cott*, 306 U.S. 511; *Abie State Bank* v. *Bryan*, 282 U.S. 765; *Atlantic Coast Line* v. *Wharton*, 207 U.S. 328; *Chicago, Burlington, & Quincy Ry.* v. *Drainage Commrs.* 200 U.S. 561. *A fortiori*, here, where the judgment below itself invades the jurisdiction of the Commission, and where the decision of public interest questions within the jurisdiction of the Commission

to determine is an essential basis for that judgment, the jurisdiction of this Court is clear.

The court's statement that the issues were waived or untimely is of no consequence, if the court nevertheless *proceeds to pass on the merits.* Thus, in *Fleming* v. *Fleming, supra,* an application was filed in the Supreme Court of Iowa, 194 Ia. 71, 174 N.W. 946 (1922), for a second rehearing on the ground that the court's decision, by reversing prior rulings on the basis of which the parties had contracted, had brought about an unconstitutional impairment of contract. The Iowa Supreme Court, after stating that "such plea of unconstitutionality, . . . is negatived by the opinion complained of," added that "if the premise were conceded, such point would have been just as available to the appellants in their original argument as in their petition for rehearing," but that "No such point was therein made" (*ibid.* at 124). The Iowa court then concluded that it could not "recognize the point now made, as presenting a Federal question" notwithstanding the court's desire "as a matter of sincere deference to the higher court, or as a matter of courtesy to the distinguished counsel" to make such determination "as would enable a review of our decision by the higher court" (*ibid.* at 124). Notwithstanding this language, the United States Supreme Court held, when the case came before it (264 U.S. at 31), that there was "a sufficient consideration of the point by the State Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one."

III

THE JUDGMENT BELOW INVADES THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION BY NULLIFYING ITS PRIOR ORDER AUTHORIZING OPERATION OF STATION WOW BY PETITIONER WOW, INC. IN THE PUBLIC INTEREST AND BY DECIDING ADMINISTRATIVE QUESTIONS WITH RESPECT TO THE TRANSFER AND OPERATION OF RADIO STATION WOW

A. BROADCASTING IS HEAVILY CHARGED WITH A VITAL PUBLIC INTEREST, AND CONGRESS ENDOWED THE FEDERAL COMMUNICATIONS COMMISSION WITH PLENARY AUTHORITY TO PROTECT, PROMOTE AND TO DECIDE ALL QUESTIONS AFFECTING THE PUBLIC INTEREST

The physical characteristics of radio propagation make broadcasting a matter of great national concern. "By its very nature, broadcasting transcends State lines and is national in its scope and importance. . . ." *Fisher's Blend Station, Inc.* v. *State Tax Comm.*, 297 U.S. 650, 655. As a result, federal legislation is "not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279.

Equally clear is the tremendous cultural, social and political significance of broadcasting. This Court, we believe, is fully cognizant of the peculiarly vital public interest character which broadcasting has—a character far transcending in its importance the traditional idea of "public interest" as applied in other fields.

The concept is largely derived from the field of public utilities where the feature of monopoly carries with it certain corollaries with respect to public regulation of rate of return, adequacy of service, etc. In the case of broadcasting, however, even though it involves an element of semi-monopolistic privilege, the significance to the public stems from different sources and rests on different reasons. In broadcasting, more than comfort and convenience is involved: it is concerned with the realm of ideas and freedom of speech. Its strongly distinctive facts invite special consideration of the public interest involved. For the vital character of radio broadcasting has become such that at no

other point on the compass of public interest is the needle so attracted in terms of actual significance to the public.

From hour to hour, radio broadcasting projects itself into the living rooms of most of our families and into the many other places where people meet. Programs are continuous through most, or all, of the twenty-four hours. Entertainment occupies a large portion of the time, and, to a great extent, the cultural level of the people is affected by the general quality of the broadcast material. Much of the people's time is devoted to broadcasts and their habits are affected accordingly. It is no exaggeration to suggest that character and way of life are heavily influenced. These facts alone make apparent the grave responsibility of the radio station licensee intelligently to appraise and to meet the needs of the community he serves.

In a still broader field, significant public issues may be determined by the people through radio broadcasting. To a real degree candidates are elected or defeated through the influence of radio. To an ever increasing degree, men powerful and good, and men powerful and dangerous have risen to positions of great influence over the people through the use of radio. So sensitive is this public mechanism that misuse of the public facility may result in grave injury to the public.

On no facet is broadcasting more significant than in its service as a mechanism of national free speech. News from all corners of the globe moves almost unceasingly and instanstaneously to the people. Radio news comment occupies a position of outstanding public importance. Over the radio important public issues are debated by partisans. The forum method of discussion moves on apace. Public appraisals of facts, of issues, and of men follow closely the presentations through the medium of broadcasting.

Free speech itself has come to have a different factual quality since the days of Thomas Paine. No longer can a substantial public opinion be influenced by a speech in the town hall. And the cost of publication of pamphlets for widespread distribution has moved beyond the reach of the individual. Twenty-five years ago free speech lacked the

practical means for being realized. Today, we have the powerful force of radio as a mechanism of national free speech. By network, a single voice moves through WEAF at New York, WMAQ at Chicago, WOW at Omaha, KOA at Denver and KPO at San Francisco, and more than one hundred other stations, to reach a nation-wide audience. For the first time in more than a century, if not in history, an individual may influence national public opinion through the sound of his voice.

Little wonder that through the work of the industry itself, and the public agency charged with its regulation, basic principles have come to be enunciated. Laying aside policies having to do with the quality and character of entertainment, we find clearly established the principle of radio as a public trust. Free speech as the right of the speaker has been appraised in the light of the obligation placed upon licensees to preserve and to operate this national public mechanism in the interest of the *listeners as a whole*, thus tending to accomplish the greatest single function of free speech itself. It has become an instrument of our democracy. News is presented fully and fairly. Comment, however incisive, tends to reflect the considerations on both sides of public issues. Forums and debates are devoted to the accomplishment of this principle. The use of the mechanism to serve private or limited purposes of the broadcaster is disapproved. Radio stations have no editors-in-chief and no editorial policy of their own. Thus we find that both the industry[4] and the regulatory body[5] have recognized the sensitive and vital character of broadcasting in its relation

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[4] The Code of the industry association, The National Association of Broadcasters, provides:

"As part of their public service, networks and stations shall provide time for the presentation of public questions including those of controversial nature. Such time shall be allotted with due regard to all the other elements of balanced program schedules and to the degree of public interest in the questions to be presented. Broadcasters shall use their best efforts to allot such time with fairness to all elements in a given controversy" (*Radio Annual*, 1944 (Radio Daily), p. 904).

[5] See *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), quoted in part, *infra*, p. 46, note 10.

to the public as a whole. Here, then, we strike a great contrast between public interest in those things which are public utilities—which radio is not—and the public interest in radio broadcasting which strikes so closely to the heart and to the minds and to the lives of a free people.

It is plain that the public interest in such a significant social instrument must be both protected and promoted: It was with that purpose in view that Congress assumed control over radio.

The very thing which directly gave rise to comprehensive congressional control early in the development of radio was the earlier subordination of the interests of the public to private advantage. When, as the President in his message to Congress of December 7, 1926, said, ". . . the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value" (H.Doc. 483, 69th Cong., 2d Sess., p. 10), Congress promptly supplied the remedy. By the Federal Radio Act of 1927 (44 Stat. 1162) and the Communications Act of 1934 (50 Stat. 189, 47 U.S.C. sec. 151), "Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137. The substantive ends to be served by this legislation are expressly stated. Section 1 of the Communications Act declares the congressional purpose: ". . . to make available, so far as possible, to all the people of the United States . . . [an] . . . efficient, Nationwide . . . radio communication service with adequate facilities. . . ." Again, specifically as to radio, Section 301 of the act provides:

> "It is the purpose of this Act . . . to maintain the control of the United States over all the channels of interstate . . . radio transmission; and to provide for the use of such channels . . . by persons . . . under licenses granted by Federal authority. . . ."

Thus, the objective of Congress was "to protect the public interest," the "national interest" in radio broadcasting. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Scripps-Howard Radio Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 6. As stated by the Court in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217: "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States."

In order to carry this policy into execution Congress established the Federal Communications Commission. Recognizing "the great need for the creation of one central body vested with comprehensive jurisdiction over the industry" and in accordance with "the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication" (H.Rept. 1850, 73d Cong., 2d Sess., p. 1), Congress endowed the Commission with "comprehensive powers to promote and realize the vast potentialities of radio". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217. It was given the job of determining "under statutory direction the rights of the people of the United States to have the best possible radio service." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938).

This, the Communications Act, among other things, contained the broad and unique direction that "as public convenience, interest or necessity requires," the Commission "shall . . . generally encourage the larger and more effective use of radio in the public interest" (Section 303(g)). Moreover, "The Commission may perform any and all acts, make such rules and regulations, and, issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" and "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Sections 4(i), (j)).

In order that these general powers may be effectuated, they are implemented by the comprehensive licensing

authority granted to the Commission. The Commission is given plenary powers with respect to broadcasting: to grant or deny construction permits, licenses, renewal licenses and modifications of licenses; to revoke licenses and to authorize or deny assignment of licenses or transfers of control over a licensee, and in that connection to pass upon "the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station", etc. (Sections 307-312, 319(a)). The standard prescribed throughout by the Congress for the exercise by the Commission of those powers (for example, in granting a license or authorizing an assignment of license) is "public interest, convenience or necessity"—the "public interest" thus required to be served being "the interest of the listening public in 'the larger and more effective use of radio,'" *National Broadcasting Company* v. *United States*, 319 U.S. 190, 216. Under Section 310(b), an assignment or other disposition of "the station license," "the frequencies authorized to be used," and "the rights therein granted" (even by transfer of control of a corporation holding a license), is permissible only if "the Commission shall, *after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Thus, the authority conferred upon the Commission is not merely a negative and restrictive control, but, rather, is the grant of affirmative and expansive powers and obligations to set up a broadcasting system through licensees of its own choice to insure continuity of public service and to obtain the best service possible.

To protect the integrity of this congressional scheme for the regulation of broadcasting, the jurisdiction of the Commission to issue licenses, approve transfers of radio stations and otherwise determine matters in the public interest must be jealously safeguarded. "Of course, no court can grant an application or authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14. And no other tribunal should be permitted, wittingly or

unwittingly, whatever the ground relied upon, to supplant the Commission in the highly complex and comprehensive business of determining the public interest questions involved in granting, denying, or nullifying such authorizations. To countenance any such encroachment would thwart the basic congressional purpose of centralized control by a single expert body to assure the listening public the maximum of broadcasting service. The considerations are well summarized by the Court of Appeals of the District of Columbia in *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938):

> "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States *to have the best possible radio service.* The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. *It is the only proper agency* to decide these public questions. . . ."

The court below, as we shall show, made just such an invasion of the Commission's jurisdiction both in the grounds for its decision and in the relief it granted. As a basis for vacating the lease of the licensed facilities and for its conclusion that it was not affecting the license in any way (which, as we shall show, was entirely erroneous), the court relied upon a separation between "license" and "property", saying that "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798). It argued further that the conceded right of the Commission to license and require compliance with its regulations "does not deprive the state courts of jurisdiction to hear and decide all *other property rights* in a radio station and the rights of parties incident thereto" (R. 797). Any such separation of such a complex congeries of rights, privileges, and responsibilities as is involved in a "radio station" is obviously artificial and

completely ignores both the legal and practical connections involved.

The facilities used in broadcasting are as integral a part of the licensed operation as the frequency itself. They are part and parcel of a single instrumentality devoted to rendering a service "in the public interest," and its disposition and control are necessarily affected by the use to which they are put. It is a well-settled principle at common-law that property devoted to a public service will not be separated from the franchise it is necessary to effectuate, and rights asserted against that property are subordinated to that principle in order to protect the public interest. *Gue v. Tide Water Canal Co.*, 24 How. 257, 263; *East Alabama Ry. v. Doe ex dem. Visscher*, 114 U.S. 340, 351; *Ackroyd v. Winston Bros. Co.*, 113 F.(2d) 657, 659-660 (C.C.A. 9th, 1940); *Louisville, N.A.& C.Ry. v. Boney*, 117 Ind. 501, 505-509, 20 N.E. 432 (1889); *Brady v. Johnson*, 75 Md. 445, 449, 26 Atl. 49, (1892); *Northern Pac. R.R. v. Shimwell*, 6 Mont. 161, 9 Pac. 889 (1886); *Overton Bridge Co. v. Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig., W.P.& I. Co. v. Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Foster and Co. v. Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868).

The Communications Act itself, moreover, makes clear that the simple separation relied on by the court below is unsound. A license is not merely a negative means of controlling radio operations but, as we have seen, an affirmative means for carrying out the basic congressional purpose of providing an "efficient, Nation-wide . . . radio communication service with adequate facilities" (Section 1) and "the maximum benefits of radio to all the people of the United States" *National Broadcasting Co. v. United States*, 319 U.S. 190, 217. "'Radio communication' . . . means the transmission by radio of . . . signals . . . and sounds of all kinds . . . including all instrumentalities, facilities, apparatus . . . incidental to such transmission" (Section 3(b)). It is the licensing of a "radio station" and a "station license" which the act provides for throughout (*e.g.*, Sections 2(a), 303-305, 307, 309-312, 318, 326). And a "'radio station'

. . . means a station equipped to engage in radio communications" (Section 3(k)). It is a specific radio station with its physical equipment which is licensed, and to which the Commission assigns a frequency. So intimate is the connection between license and property, that the Commission's jurisdiction attaches prior to the construction of a station. And the Commission may deny or grant a permit to construct a station as public interest, convenience or necessity may dictate (Section 319(a)). The physical design of the station is laid out in vast detail in the application for construction permit—it is this detailed pattern which is subsequently licensed—both in the original construction and subsequent operation of the station, the Commission exercises broad and detailed authority over the physical properties: the location of the station, the equipment, the antenna systems, etc., so that changes, for example, in tubes or in actual or relative location or height of any of the antenna towers all require Commission authorization.[6]

In the case of transfers of licenses and "the rights granted therein," the association of the physical property with the license and the jurisdiction of the Commission over the one as over the other are emphasized by the grant of authority over a disposition of license "indirectly by transfer or control of any corporation holding such license" (Section 310(b)).

So integral a part of the license are the facilities in Congressional contemplation that Section 319(a) requires that the application for a construction permit specifically set forth when "the station is expected to be completed and in operation." And Section 319(b) provides that a permit, when granted,

> ". . . shall show specifically the earliest and latest dates between which the actual operation of such

[6] Rules and Regulations, Secs. 3.44-3.64; Standards of Good Engineering Practice, pp. 36-76.

The close association of the property devoted to broadcasting and the authorization therefor is shown by the license presently outstanding for Station WOW, set forth in Appendix C, *infra*, p. 89. See also the Commission's Consent to Assignment of License of Radio Station WOW in this case (Ex. 32, R. 661, 662A).

> station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified. . . ."

In recognition of the fact that the physical facilities are the necessary complement of the right to use the frequency in a licensed operation, the Commission has consistently refused to permit a licensee to cease operations except for a few days because of an emergency (Rules and Regulations, Section 3.71). Indeed, to recognize the validity of a license separated from the facilities licensed would violate the Congressional purpose of providing for the "use" but not the "ownership" of radio frequencies (Section 301). The separation of a license from the facilities necessary to its exercise is an anomaly, foreign to both congressional intent and administrative practice.

With the facilities used in broadcasting being such a necessary and integral part of the license, the permissible scope of State court action in dealing with a "radio station" cannot rest upon any such false dichotomy as that drawn by the court below between the "license" and the "property" used to effectuate it. The fact is, of course, that there is a single instrumentality, dealing with any part of which necessarily affects the others. The line delimiting the sphere within which the State court may act must, rather, be drawn on the basis of the character of the questions it purports to decide and the effect of its judgment upon the jurisdiction and orders of the Commission. For example, it would seem plain that a State court can not, on the ground that it is dealing with physical property or determining property rights, determine that the Commission's regulations as to equipment or antenna systems mentioned above (p. 38) are improper, or set aside a lease of a station because it deemed inadequate the engineering of the licensee which was in conformance with Commission regulations. No more, we submit, may a State court, under the guise of dealing with property and deciding property rights, nullify a license or that a licensee intends to

abuse his license by propagandizing for his private advantage, is not financially qualified or fails to meet any other essentially public interest criterion within the jurisdiction of the Commission to decide. That the court below decided just such public interest questions will, we believe, appear from an analysis of its opinion and decree.

It is, of course, well settled that where a federal right is involved, this Court will not accept the language or conclusions of the State court upon points upon which the federal right may rest, but itself "will review or independently determine all questions on which a federal right is necessarily dependent" (*United States* v. *Pink*, 315 U.S. 203, 217); and that this Court will "inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision *having no fair support*" (*Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 745).

B. THE JUDGMENT AND DECREE OF THE COURT BELOW (1) INVOLVE THE DECISION OF ESSENTIALLY PUBLIC INTEREST QUESTIONS AFFECTING BROADCASTING WITHIN THE JURISDICTION OF THE COMMISSION TO DETERMINE AND (2) NULLIFY ACTION OF THE COMMISSION BASED IN ITS DETERMINATION OF THOSE QUESTIONS

That the case itself, as presented in the trial court and as decided by the Supreme Court of Nebraska, involves predominantly vital public interest considerations within the jurisdiction and the peculiar competence of the Commission will be apparent, we believe, on analysis of the petition, the issues as developed in the course of trial, the decision of the majority of the Supreme Court of Nebraska, and the decree.

1. The Petition

The petition (summarized *supra*, pp. 5-8) explicitly sought simply the nullification of the transfer approved by the Commission and of the radio station license issued to the lessee (R. 10). The petition itself refers to the pendency of the proceedings before the Commission and attacks as insufficient the showing made by petitioners in the Commission proceedings (R. 5-6). Respondent, avoid-

ing an appearance or any step toward intervention before the Commission, nevertheless, alleges that the Mayor of Omaha had filed objections with the Commission, calling for a public hearing on the license transfer "for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska" (R. 6). A large portion of the petition is then devoted to allegations as to the threatened misuse of the station and the station license as a propaganda mechanism in the interests of those advocating public ownership and operation of electric power facilities (R. 7-8). All of this, it is alleged, is "contrary . . . to the best interests . . . [of] the listeners of the station and . . . the public generally" (R. 9).

The petition likewise complains of the insistence of the Society that the concededly competent management of Gillin be continued by the lessee corporation (R. 8). In this respect also, the petition strikes at the heart of a consideration not only of interest to both parties to the transaction but also of great significance to the Commission. That body must consider the competency of management and its probable effect on the quality of the service to the public projected in the transfer which it was called upon to approve.[7]

The petition does not contain the word "fraud." Its claim is that the consideration to be paid was inadequate (R. 6). Strangely enough, it also alleges that the lessee receiving these valuable and profitable facilities and operations at an inadequate cost would, nevertheless, prove to be financially unstable and hence lacking in the prospect of continued successful operations and, in turn, of securing performance of the obligations owed to the Society (R. 6-7). Here again, the petition projects itself into a problem of public interest with which the Commission is vitally concerned; namely, the financial basis of a broadcasting operation as an assurance of its soundness and ability to meet obligations and of the continuity and character of the public service to be rendered under the license.[8]

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[7] See Commission decisions, cited *infra*, p. 49, note 11.

[8] See Commission decisions, cited *infra*, p. 50, note 13.

As pointed out below (pp. 52-60), the problem of appraising the value of a broadcast station is one necessarily founded upon factors within the peculiar competence of the regulatory body. In this same problem there is also involved the question whether extraordinary profits can be capitalized by normal promotional methods without necessarily attributing a great portion of those profits to the element of monopoly inherent in the public grant of a radio frequency, and without running head-on into the statutory prohibition against recognizing any private property interest in this public grant.

Nor can the petition be reconciled with the strong public interest, frequently recognized by the Commission, in preferring responsible and competent local, personal management to management by a large financial institution with a predominant degree of absentee ownership and direction, and in which the broadcast operations constitute a subordinate part of its interests (R. 289, 316-317).[9]

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[9] See Commission decisions, cited *infra*, p. 49, note 11; p. 50, note 13.

In designating for consolidated hearings applications for transfer of control of a licensee to a bank, as trustee, and for renewal of license, the Commission specified the following issues:

"To determine whether public interest would be served by the transfer of control of Station KFMB to a bank or trust company which has no beneficial interest in the station and whose regular business is devoted to banking and to the administration of various and numerous trusts, estates, accounts, and agencies.

"To determine the manner in which Station KFMB would be operated, particularly with respect to management and service, if the application for transfer of control were approved.

"To determine whether approval of the transfer of control of Station KFMB to the First National Trust and Savings Bank of San Diego, trustee, under the terms and conditions proposed in the application would be consistent with the provisions of the Communications Act of 1934 and in the public interest.

"To determine whether public interest, convenience, and necessity would be served by the granting of renewal license for operation of Station KFMB under the control of a bank or trust company which has no beneficial interest in the station and whose regular business is devoted to banking and to the administration of various and numerous trusts, estates, accounts, and agencies." Notices of April 15, 1943 in

Finally, it should be noted that the petition at no point discloses why respondent took no steps to present these public considerations to the regulatory body having both the responsibility and the peculiar competence to consider them.

2. The Trial

The respondent, plaintiff below, did not appear in the course of the trial. All of the testimony was presented through the officers and directors of petitioners and through a group of noted experts, *all of whom testified upon behalf of petitioners* (R. 542, 580, 612, 627, 636, 644). The trial itself cured none of the basic deficiencies in the petition, and produced nothing which could properly be deemed to redefine the case as one falling within the appropriate realm of private litigation in a local court of equity. The trial

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In re Application of the First National Trust & Savings Bank of San Diego, Docket No. 6500 (1943), and *In re Application of Worcester Broadcasting Corp. (KFMB)*, Docket No. 6501 (1943).

Transfer of control to the Bank was approved on amendment of the application to show that the Bank would transfer the station; consent to transfer of control to two individuals was granted October 26, 1943 (B5-TC-331).

In *In re Application of Doughty & Welch Electric Co. Inc. (WSAR)*, Docket 5902, involving an application for consent to assignment of license, the Commission's decision of October 16, 1944 stated:

"The Commission has heretofore indicated, in actions upon other applications, that it has serious questions as to whether broadcast stations should be licensed under conditions where responsibility for management would be placed in the hands of trustees without beneficial interest, for management in the manner of trust properties. The duties and responsibilities which devolve upon licensees of broadcast stations should not, in the judgment of the Commission be placed in the hands of persons and organizations whose primary interests are in rendering general trust services as trustees. In this case, the Commission finds that provision has been made for competent interested management of the station by trustees who have shown that it will be a matter of primary interest with them, and the station will be managed by a competent experienced executive. The evidence which has been presented affords assurance that operation of WSAR by the Fall River Broadcasting Company will provide a service which is efficient and at the same time on a broad basis consonant with the obligation of licensees to render service in the general public interest."

court made short shrift of the charges and made findings in favor of the petitioners. At the conclusion of the oral arguments, it said:

> "In the first place, I do not think there is any fraud here: there isn't any evidence of any fraud.
>
> "I don't think that the charges made with reference to the public service company have been substantiated; there has not been any evidence at all on that.
>
> "Now, taking into account these facts, I do not believe I would be justified in entering a decree setting aside this lease. And if you will, prepare a decree along that line" (R. 730).

3. The Nebraska Supreme Court Opinion

The vulnerability of the decision below is well epitomized in the following pronouncement of the majority on its own competence to appraise the complicated, special problems presented:

> "We have considered the testimony of those witnesses that are experienced in radio and those who are experienced in business matters generally giving their opinion that it was a good deal for the society and that the provisions [of the lease] are adequate, but *from our consideration* of the entire record we do not agree with their opinions" (R. 760).

But the real vice of the decision is not that the majority substituted its own judgment for that of *all* of the witnesses qualified to testify on the specialized issues involved, but that it usurped the functions of the expert administrators in deciding those issues. To appreciate this, a detailed review of the opinion is necessary.

The first two questions discussed by the court are of no moment. The opinion first concludes that the Board of Directors of the Society had ample power to authorize a transfer of the radio station (R. 747-748). It next concludes that there is no authority for attempting to "modify" the lease (R. 748-749).

(a) *THE PUBLIC POWER ISSUE*

The third question discussed is of vital public interest, namely, the allegation that the station was to be used as a propaganda mechanism for those interested in the acquisition of private power facilities by public agencies.

This case, it is apparent, was instituted, tried and decided in the midst of a widespread and typically bitter conflict over the public ownership of electric power facilities. This is reflected in the petition (R. 7-8). Its chief point is that the station would be used by the transferee, contrary to the public interest, in advancing the cause of those advocating public ownership. Following the pattern of the pleadings, the plaintiff's case was largely concerned with this issue. (See, *e.g.*, examination of Guy C. Myers (R. 88 *et seq.*); the cross examination of Francis P. Matthews (R. 211 *et seq.*); the examination of John B. Dawson (R. 275 *et seq.*); cross examination of Charles A. Hines (R. 423), cross examination of Farrar Newbury (R. 508 *et seq.*)). Thus, the case was initially pitched on, and throughout continued to take on the character of a controversy over public ownership.

The majority of the Supreme Court of Nebraska assumed this was an issue within its competence and reviewed the matter in detail in its opinion (R. 753-754). While it appeared to make findings throughout in favor of these petitioners, it actually gave to this vital public issue the same cavalier treatment which characterized its opinion on the other public issues involved. It ignored completely the fact that this issue had been brought to the attention of the Commission prior to its approval of the transaction before the court (by Mayor Butler of Omaha) (R. 6), and the fact that respondent himself had failed to intervene before the Commission and support this charge.

The interest of the Commission in, and its jurisdiction over, this issue seem plain. The Commission has consistently refused to license the operation of a radio station failing in its duty to present well-balanced news and comment on public issues, or which itself projects editorially its own

private views on one side or another of controversial public questions.[10]

The Nebraska court, ignoring the general public character of the controversy and the exclusive jurisdiction of the Commission to appraise it, disposed of the issue in the following language:

> ". . . there is no evidence that Consumers has any interest in lessee nor have any of the officers and directors of the society any interest in Consumers or lessee nor can Consumers use any of its funds for this purpose. If any of these parties desired time on this station to explain their plan to the public they could purchase it no matter who owns

[10] See *Trinity Methodist Church South* v. *Federal Radio Commission*, 62 F.(2d) 850 (App.D.C. 1932); *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 47 F.(2d) 670 (App.D.C. 1931).

In its decision *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), the Commission had said (pp. 339-340):

". . . The material in the record has been carefully considered and compels the conclusion that this licensee during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

"'Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission."

> the station and the same amount of time would have to be made available for the other side. It also appears that there is a divergence of opinion among the stockholders of lessee as to the desirability of Consumers acquiring these facilities. The record does not sustain this contention of the plaintiff" (R. 754).

(b) *"CONSTRUCTIVE FRAUD".*

After disposing of the propaganda issue, the court found that there was no plan of the individual directors of the Society to procure for themselves, their friends or associates, control of the radio station and that there was not in the record "any evidence of actual fraud on the part of the officers and directors of the Society" (R. 755).

The majority then proceeded to a discussion of what it chose to term "constructive fraud" (R. 755). It appears to base this upon (1) an appraisal of personal relationships, admittedly non-fraudulent, between Bradshaw, the President of the Society, and Gillin, who for many years had been the station manager and who became the president of the lessee corporation; (2) lack of financial soundness and stability in the lessee corporation and the proposed operations; and (3) a claimed inadequacy of the consideration. Even these stated grounds, regardless of whether they were supported by any evidence, necessarily involved vital public considerations within the jurisdiction and peculiar competence of the Commission.

(1) *Gillin.*—That John Gillin, Jr. was a highly competent operator and manager of this public service is conceded by all.

Niles Trammell, President of the National Broadcasting Company, testified as follows:

> "The management is splendid (R. 548). . . I think the management has been unusually capable, and with Mr. Gillin continuing as Manager I see no reason why it shouldn't conitnue to be one of the better operated stations in the country (R. 556).

> "Mr. Gillin has a very high regard for the public service responsibility of a radio station, and I am certain that the station under his continued management will serve, and serve well, the public of Omaha and the vicinity" (R. 556-557).

J. Harold Ryan, Assistant Director of Censorship for Radio, and later President of the National Association of Broadcasters, himself an experienced and competent radio station operator, testified as follows:

> "The management has always had a very high standing in the industry" (R. 584).

Gardner Cowles, Jr., an outstanding radio executive, testified as follows:

> "I think the management has been excellent in the past and a buyer could not hope to make much improvement in management" (R. 619).

The minority opinion stated:

> ". . . the evidence is overwhelming in establishing Gillin's ability, capacity and standing in the radio field" (R. 763).

President Bradshaw gave a like appraisal of Gillin and testified that he was acting in the interest of the Society, as well as of the public, in taking the position that Gillin's management should continue under the lessee, in which of course the Society continued to hold a financial stake (R. 328-329).

The majority opinion cast suspicion upon the fact that Gillin was receiving a material interest in the lessee corporation in return for his undertaking the continued management (R. 760). The record, however, shows not only that the Society had no control over the relative stock interests in the lessee corporation, but also that Bradshaw's friendship had nothing to do with it (R. 184-185). The record is devoid of any evidence that Bradshaw or the Society

knew the nature of Gillin's interest in the lessee corporation at the time the lease was signed.

The crux of this issue, as it was seized upon by the majority, is that Gillin was to have the continued management of the public service operations of the station and a substantial interest in the venture. These basic facts appeared in the application before the Commission on its approval of the transfer of the station and were an essential part of its considerations (R. 394-395). Hardly any consideration presented to the Commission on a proposed transfer is of more vital importance than that of competent and responsible management on the ground. For all that appears, the Commission might not have approved this very transfer if anyone falling substantially short of Gillin's qualifications and local experience had been proposed as manager. The Commission has stressed in many of its decisions the factor of competency and the desirability of management on the ground by responsible men who live and work as a part of the community served by the station.[11]

Likewise that Gillin was to receive a material interest in the lessee corporation, and, hence, a stake in its success, while frowned on by the Nebraska court (R. 760), was precisely the type of arrangement which the Commission encourages as conducive to the highest quality of public service in the interest of the community itself.[12] The fact, stressed by the Nebraska court, that President Bradshaw knew Gillin, recognized his competence, and took the position that he should continue to exercise it, did not lessen the Commission's concern with the problem. In fact, the very security interest which the majority of the Nebraska court

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[11] *In the Matter of Wilson*, 9 F.C.C. 56, 63 (1941). *In the Matter of Falvey*, 8 F.C.C. 279, 288 (1940); *In the Matter of Voice of Brooklyn*, 8 F.C.C. 230 (1940); *In the Matter of Capitol Broadcasting Co.*, 6 F.C.C. 72 (1938); *In the Matter of Havens & Martin, Inc.*, 6 F.C.C. 237 (1938); *In the Matter of Sapp and Sapp*, 6 F.C.C. 521 (1938); *In the Matter of Hughes*, 5 F.C.C. 120 (1938); *Cf. In the Matter of Federated Publications, Inc.* (*WELL*), 9 F.C.C. 150, 156 (1942).

[12] See cases cited *supra*, p. 42, note 9; p. 49, note 11.

claims to protect would presumably be furthered by the continuance of the Gillin management (R. 328-329). That Bradshaw also saw a public benefit from that continued management only brings his view into conformity with the view and the policy of the Commission and that of all the experts who testified in this case.

(2) *Financial Stability.*—Lack of financial stability of the lessee corporation equally poses a consideration of public interest and one falling within the jurisdiction of the Commission to decide. It is of passing interest that the majority complains in one breath that the lessee will lack financial stability (R. 759-760) and in the next breath that it will be unjustly enriched (R. 756). The latter point is discussed below. At this juncture it is of importance to note that in every case, whether of original license or of transfer, the Commission is charged with the duty of examining into the financial stability of the proposed operating company. Sound fiscal operations must be assured in the public interest. It is vital that the public service be not prejudiced by lack of financial stability, the inability of the licensee to meet its obligations and, hence, its inability to render a competent public service. And, of course, the Commission must thus be assured of a projection into the future of that public service without fear that it may be terminated or jeopardized.[13]

The majority opinion sets forth and places reliance upon the same data as to finances, earnings, capitalization, stock ownerships, classes of stock, dividend rights, etc., of the lessee corporation (R. 752-753, 758-760), which had been presented to the Commission when the transfer was approved (R. 394-403). Some of this data has been summarized above (pp. 8-9). The consent of the Commission,

[13] *E.g., In the Matter of Liberty Life Ins. Co.*, 9 F.C.C. 104 (1942); *In the Matter of Weathersbee*, 8 F.C.C. 105 (1940); *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940); *In the Matter of United Theatres, Inc.*, 8 F.C.C. 489 (1941); *In the Matter of Atwood*, 7 F.C.C. 72 (1939); *In the Matter of Radio Enterprises, Inc.*, 7 F.C.C. 169 (1939); *In the Matter of Roberts-McNab Co.*, 6 F.C.C. 548 (1938). See also *Heitmeyer v. Federal Communications Commission*, 95 F.(2d) 91 (App.D.C. 1938).

indeed, to the transfer of the station was explicitly based "on the statements contained in, or made in connection with, the application" (Ex. 32, R. 661, 662A).

The statute requires the Commission to procure this very data bearing upon stock ownerships and upon financial stability (Section 308(b), 310, 319(a)). And the Commission consistently gives attention to any stock or fiscal irregularities.[14] It cannot, indeed, perform its appropriate functions of issuing licenses in the public interest without acquiring the very information relied upon by the court in passing judgment upon the financial stability of the proposed operator.

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[14] *E.g., In the matter of the Travelers Broadcasting Service Corp.*, 7 F.C.C. 504 (1939); *In the Matter of the WGAR Broadcasting Co.*, 4 F.C.C. 540 (1937).

Thus, recently, in *In re Application of Calumet Broadcasting Corp.*, Docket No. 6583, the Commission designated an application for hearing upon the following issues, among others (Notice of April 20, 1944):

"2. To obtain full information with reference to the method of financing the applicant corporation, and the issuance, ownership, transfer and control of the stock of the applicant corporation.

"5. To determine what contracts, or agreements, or understandings have been executed or entered into relative to the transfer of stock in the licensee corporation, and whether full information has been presented to the Commission relative thereto.

"6. To determine the source of funds used in the purchase of equipment and other property by the licensee and the plans of meeting the operating expenses in the event of a grant of the instant application.

"7. To determine and obtain full information as to the means and methods used by the applicant's controlling stockholders, George F. Courrier and Doris Keane, in acquiring control of the Hammond-Calumet Broadcasting Corporation and the financial transactions involving the issuance, ownership and transfer of stock of said corporation.

"8. To obtain full information as to the various financial statements and information prepared, submitted and offered by George F. Courrier and Doris Keane with respect to the Hammond-Calumet Broadcasting Company."

The applicant subsequently amended his application, and, in acting upon his petition to grant it, as amended, the Commission ordered the application, as amended, designated for further hearing (Order of December 4, 1944), in order, among other things:

"2. To obtain full information with reference to the method of financing the applicant corporation and the issuance, ownership, transfer and control of the stock of the applicant corporation."

There is no assurance, indeed, that the restrictive provisions which the court found necessary to protect the assignor, would not give to the assignor such extensive control that the Commission could not approve a station transfer presenting those features. See *In the Matter of the Liberty Life Ins. Co.*, 9 F.C.C. 104 (1942); *In the Matter of the Travelers Broadcasting Service Corp.*, 7 F.C.C. 504 (1939).

(3) *Consideration.*—The bare question as to adequacy of consideration for the transfer of a public service operation is one more easily stated in legalistic terms than resolved on the basis of the economic and public interest issues presented. The rental alone, apart from other valuable considerations such as the installation of equipment for the newer forms of broadcasting, amounts to $1,111,896 for the 15-year period (Ex. 1, R. 21, 22) for property originally costing $175,000 (R. 581), or little more than twice the average annual rental; and this investment has since been entirely written off (R. 581). It may be noted, in passing, that the majority chose to ignore the uncontroverted testimony of every responsible expert witness who appeared on this subject and to substitute its own judgment on the question of valuation (R. 760).[15]

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[15] Five of the foremost figures in the radio broadcasting industry testified in this case and gave their opinion on the question of the adequacy of the consideration received by the Society under the lease. These witnesses were:

Niles Trammell, President of the National Broadcasting Company:

"I feel that it is more than an adequate consideration for this station in view of the anticipated taxes that will be required of the new owner. Even without the tax consideration, it is an adequate consideration in view of the hazardous nature of the business of broadcasting, the probable developments in the future, and the necessity on the part of the new owners to maintain the equipment and to install the new developments as they come along, such as frequency modulation and television" (R. 544-545).

On cross examination he said in answer to the question of whether the consideration was a fair price: "I think it is more than reasonable . . ." (R. 548).

J. Harold Ryan, President of the National Association of Broadcasters:

Apart, however, from the grave question as to the merits of the court's conclusions, are the significant facts that the court exercised a judgment on this facet of the case relying upon considerations outside its own competence and within the competence of the expert regulatory body; and that the court, in arriving at its conclusion of inadequacy, ran counter to the provisions of the Communications Act of 1934, which forbid the treatment of publicly licensed radio frequencies as property (Sections 301, 307(b), 310(b)).

Before considering these factors, several other factors, overlooked by the majority in its appraisal should be noted. In the first place, it will be recalled that the Society is fraternal and non-profit in character; it was under constant fear that by carrying on commercially a profitable radio operation, not subject to tax, the entire business of the Society might, by legislation, become subject to taxation (R. 15-16, 289, 297-298, 310). The radio operation had been a small fraction of 1% of the entire business of the Society (R. 316-317, 507), and it was felt that the entire business should not be prejudiced through this one small business (R. 286 *et seq.*). Some of the officers also felt that they themselves were not qualified to manage a radio station and that their attention and that of the Board of Directors could better be devoted to the insurance business rather than what to them was a side issue and something of a novelty (R. 289, 317).

"I would have no hesitancy in saying that it is not an inadequate consideration and it seems to me that it is very adequate and I am really surprised that it is as large a figure as you have indicated" (R. 582).

Gardner Cowles, Jr., President of Iowa Broadcasting Company:

"All the facts lead me to believe this is a fair price. . . I think I would have made the terms of the lease approximately what the terms of this lease are" (R. 619).

Joseph O. Maland, Vice President of Radio Station WHO, Des Moines, Iowa:

"In my opinion I believe that the least rental as outlined above is more than adequate and more than could be secured by rental to other people in the radio industry" (R. 647).

Harold Hough, President of Oklahoma Broadcasting Company, Inc.: ". . . the price is not only most adequate, but high" (R. 640).

The majority opinion fails to give weight not only to the validity of this decision by the management, but also to the question of exemption from taxation as affecting the amount of the consideration. Naturally, once a policy was established to dispose of the station, the Society could not expect to effect the disposition into the hands of another non-profit, non-taxed operator. Hence, the value to a commercial purchaser or lessee could not be arrived at on the assumption that the lessee enjoyed the same immunities.

The majority opinion further ignored additional items of consideration and of security accorded to the Society. The property is to be delivered back at the end of the 15-year period with all substituted properties and new installations (Ex. 1, R. 21, 24), the lessee meanwhile maintaining taxes and insurance (Ex. 1, R. 21, 23). Various other restrictive and security provisions were contained in the lease (Ex. 1, R. 21, 23-26).[18]

It is also significant that the lessee undertook to keep in step with the changes in the art and to install new equipment and services accordingly (Ex. 1, R. 21, 23). This is a matter of great moment. Frequency modulation is

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[18] (a) The lessee agreed to maintain the radio station and all of the leased property and to install new equipment which included color television.

(b) The lessee agreed to pay all taxes.

(c) The lessee agreed to maintain and pay all insurance.

(d) The lessee agreed to turn back not only the property originally leased but at the end of the 15-year term to deliver back all substituted property and all new installations.

(e) In the event of default in the payment of rent continuing for 30 days, the lessee agreed to return all of the then leased property, books, records, accounts and outstanding contracts.

(f) The lessee agreed not to pay excessive salaries or expense accounts and was limited to a salary of $250.00 per month or an expense account of $100.00 a month during any default in payment of rent.

(g) All funds of the lessee are required to be deposited in a bank to be mutually agreed upon, and all bills shall be paid by check.

(h) The Society is given the right to examine the books and accounts of the lessee at any time.

(i) In the event of any default whatsoever under the lease the Society may recover the leased property or exercise any other legal right that it may have.

mature and ready for exploitation. The Commission, after extensive hearings, has set aside a large number of frequencies to be used in broadcast operations by this improved form of audio-radio.[17] Fifty-three FM stations have already been authorized; more than 250 applications are pending before the Commission.[17] That it will move rapidly into competition with amplitude modulation broadcasting is something of which that the Commission, of course, is currently aware.[17] The expenses of these installations are substantial, perhaps greater than for amplitude modulation. That FM will involve heavy plant investment and heavy operating expenses, and at the same time will offer a competition and division of audiences and of advertising revenues with the present AM broadcasting, is a matter well known in the industry and certainly peculiarly well known by the Commission.[18]

Television, too, has been commercially authorized. In the course of a few years it will develop rapidly. Radio channels have been set aside by the Commission for commercial operations in the band from 50 to 294 megacycles, and for experimental operations in the band above 300 megacycles.[19] The television installation will be many times more expensive than even the FM installation. Its operating expenses will be still heavier. Sizeable operating losses in both FM and television broadcasting are in order for several years.[20] Here again, the Commission is the public body, and only public body, competent to review the facts; and it is the only public body which has the competence to

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[17] Federal Communications Commission, Report of Proposed Allocations from 25,000 Kilocycles to 30,000 Kilocycles Docket No. 6651, January 15, 1945, p. 67.

[18] Federal Communications Commission, Docket No. 6651, Exs. 172, 173; Hearings on S. 814, Senate Interstate Commerce Committee (78th Cong., 2d Sess.), p. 864.

[19] Federal Communications Commission, Report of Proposed Allocations (*supra*, n. 17), p. 85.

[20] Federal Communications Commission, Docket No. 6651, Ex. 263; Hearings on S. 814 (*supra*, note 18), p. 861.

appraise the financial obligation of a licensee undertaking to develop these new arts, and the impact of that obligation, not merely upon the appropriateness of a sale or rental price but upon the licensee's financial qualifications to carry on in the future successfully.

An essential feature of the court's conclusion on consideration is its own analysis of various other negotiations (R. 757-758). *The majority did not base its decision on consideration alone.*[21] It relied also upon the quite different factors discussed above (pp. 45-52), such as Gillin's relations to Bradshaw and the security provisions of the lease. And in its attempted appraisal of the facts "leading up to" the negotiation of the lease terms, the majority moved squarely into the field of Commission competence.

Thus, the court stresses the efforts of the Omaha World Herald to acquire this station in 1936 and in 1937, and observes significantly that nothing came of these negotiations (R. 757-758). It is of interest that the court *again* complains "that the World Herald again made efforts to acquire the station but were turned down until the negotiations hereinafter discussed were completed" (R. 758). It is not entirely clear why the court was solicitous over this particular would-be purchaser, but it is certain that the Commission would never have given an offer from the Omaha World Herald the weight attached to it by the Nebraska court for two reasons. The Omaha World Herald has for many years owned one station in Omaha (KOWH, operating daytime on 660 kilocycles with 500 watts, *Radio Annual, 1944* (Radio Daily, p. 492)). Under the Commission's policy against ownership of more than one station

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[21] The majority stated: "If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof . . ." (R. 756-757).

by the same interest in the same locality[22] there is a serious question whether the World Herald could have acquired Station WOW.

Moreover, the World Herald issues a morning and evening edition and is the only daily newspaper in the city of Omaha.[23] In circulation it occupies a dominant position in the State of Nebraska. Radio Station WOW, Inc. has the greatest electrical coverage and service area in the vicinity of Omaha and the most successful public operation of any radio station in the State. A transfer of WOW to this newspaper would raise one of the gravest questions of public policy with which the Commission has been concerned. Extensive consideration in prolonged public hearings has been given to the problem of newspaper ownership of radio stations.[24] Stressed in those hearings were cases precisely like the one theoretically projected by the Nebraska court as one of the grounds for its conclusions of constructive fraud, that of a single widely dominant newspaper acquiring the outstanding radio station in the same vicinity.[25] In concluding those investigations the Commission said:[26]

> "Aside from the specific question of common ownership of newspapers and radio stations, the

[22] The Rules and Regulations of the Federal Communications Commission provide (Sec. 3.35):

"*Multiple Ownership.* No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

[23] Editor and Publisher, *International Year Book* (1944), Vol. 77, No. 5, p. 68. It has a combined daily circulation almost three times as large as that of the next biggest newspaper in Nebraska. *Ibid.*

[24] Federal Communications Commission, *In re Orders 79 and 79A*, Docket No. 6051.

[25] *Ibid.* Exs. 8, 27-64; Tr. 405-583.

[26] *Ibid.* Public Notice, January 13, 1944, Docket No. 6051.

Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service.

"In the processing of individual applications for licenses, the Commission will inquire into and in its decisions give expression to 'public interest' considerations. The Commission does not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business. However, it does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."

This, at least, raises a serious question not only of the ultimate effect and validity of any contract to transfer the station to the World Herald, but of the weight to be given an offer for such transfer, both questions upon which only the Commission is qualified to pass.[27]

Again, the majority of the court relied upon negotiations with the National Broadcasting Company to advance money by way of mortgage which NBC refused, and a later discussion of a lease which was to include an option

[27] *In the Matter of Butler*, 9 F.C.C. 141 (1942); *In the Matter of Courrier*, 9 F.C.C. 139 (1942); *In the Matter of Puerto Rico Advertising Co., Inc. (WPRA)*, 9 F.C.C. 181 (1942); *In the Matter of Scripps*, 9 F.C.C. 206 (1942).

to purchase (necessitating a transfer of license) (R. 757-758). Those negotiations, under the Commission's regulations cannot be legally consummated,[28] yet the Nebraska court relied on them in some degree as an indication that the rental actually received was inadequate. In doing this the court ignored the direct testimony of NBC's own president that the consideration here involved "is more than an adequate consideration" in the light of the tax situation, the hazards of the business, and the obligation to keep step with new developments (R. 544-545).

There is one additional and vital defect in this effort of the majority of the Nebraska court to evaluate these properties. Its conclusion can logically be traced in part to a capitalization of the profits in recent, as distinguished from prior, years. This lease involved, in addition to other substantial considerations mentioned above, the payment of $1,111,896 over a 15-year period (Ex. 1, R. 21, 22).

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[28] Sec. 3.106 of the Commission's Rules and Regulations provided:

"No license shall be granted to a network organization . . . for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

In *In re Application of The Sidles Co.*, Docket No. 6622, the Commission set for hearing applications involving interests of a national network in stations in Charlotte, North Carolina and Lincoln, Nebraska and specified the following, among other, issues (Notice of January 13, 1944):

"5. To determine the character and extent of existing broadcast facilities in Charlotte, North Carolina, and whether the licensing and operation of Station WBT as contemplated in the application for consent to assignment of license and transfer of control (B3-AL-403 and B4-TC-363, respectively) would be consistent with the provisions of Commission Regulations, particularly Section 3.106.

"6. To determine whether the acquisition by Columbia Broadcasting System, Inc. of a stock interest in KFAB Broadcasting Company, in the light of the existing and proposed network affiliation agreements between Columbia Broadcasting System, Inc. and KFAB Broadcasting Company, would constitute an extension of control of standard broadcast stations by a network."

The determination of similar questions, upon which the Court did not and could not pass, was necessary here.

The entire cost, which had already been written off, was little more than twice the average annual rental rate (R. 581).

In placing emphasis upon these recent profits, the court ignores the greatest single cause which gives rise to the larger profits. Even with the highly competent management, it could not be expected that if everyone were free to go into the radio broadcasting business the profits would remain so high. Competition is always trying to move into this field. It is a well-known fact that the radio frequencies are limited, that there can be only a very few stations in a given city. Without this public grant of the use of a public facility and the necessary element of monopoly which goes with it, these profits would hardly be conceivable. The method, apparently adopted by the court below (R. 756), of capitalizing profits to arrive at a valuation is one of the surest ways of running counter to the declared purpose of Congress in the Communications Act of 1934, "to provide for the use . . . but not the ownership" of radio frequencies (Section 301). As this Court said in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."

Moreover, in terms of the broad public interest, the question is whether a State court should be allowed to insist upon such valuations as will make public service in the field of radio broadcasting not a highly personalized, competent public service, but so expensive an enterprise as to be open only to large financial interests, excluding the average citizen with the competency and character of the licensee before the Court.

4. The Decree

In addition to deciding questions within the purview of the Commission in holding that the respondent was

entitled to recovery, the court below, in the relief which it provided, arrogated to itself the Commission's functions of determining whether a particular broadcast operation should be carried on, and if so, by whom.

The Commission's order of December 15, 1942 (Ex. 32, R. 661, 662A) granted consent to the assignment of the license "authorizing operation of the transmitting apparatus located at No. 56th & Kansas Avenue, Omaha, Nebraska" from the petitioner society to petitioner WOW, Inc.; and provided that, upon the completion of the transfer of the station, *"the assignee is authorized to begin the operation of the station in accordance with all the terms and conditions of said station license."* An essential predicate for this authority was, of course, that the assignee obtain the station under lease. Indeed, the order itself provided (R. 662A):

> "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee . . . that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith."

The decree of the court below, however, ordered:

> ". . . that the lease to the station, . . . and the transfer of the license to operate the station be vacated and set aside . . . that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose" (R. 761).

On its face, therefore, the decree purports to determine that Radio Station WOW is to be operated, by the Society and not by Radio Station WOW, Inc.—a matter for determination by the Commission alone. (As to possible objections by the Commission to a new grant to the Society, *Cf.* Commission's decisions cited *supra*, footnote 9, p. 42.)

It should be noted that the original license assigned to Radio Station WOW, Inc. expired in 1943, and that the

Commission, since then, has *twice* issued new licenses to that company, one effective February 17, 1943 (Appendix C, p. 89), the other effective June 1, 1944 (Appendix C, p. 91). In issuing these renewal licenses, the Commission, under Section 307(d) of the act, was "limited to and governed by the same considerations and practice which" affected "the granting of original applications," and was therefor obliged to determine that, *as of these later dates,* the operation of the station by Radio Station WOW, Inc. would serve "public interest, convenience, or necessity." Thus, the judgment below overrode the determinations of the Commission not only as of the date of the original transfer, but also as of the dates of the later license renewals.

To be sure, in its opinion on rehearing, the court below interpreted its decree, without, however, changing either its language or its substance (R. 797). Although stating that "the question of the federal license . . . [is] . . . a question solely for the Federal Communications Commission" (R. 797), and that it "is a matter that does not concern this court and is not involved in the decision of the case now before us" (R. 797), the court affirms that "the effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status" (R. 797). The avowed recognition of Commission jurisdiction is verbal only; it is but further proof that the separation of "license" and "property" upon which the court relied is untenable. For, in fact, by the decree the court as effectively usurps the Commission's jurisdiction as if it undertook itself to perform the licensing functions entrusted to the Commission. A description of the effect of the decree upon the administrative action of the Commission makes this plain.

In the first place, by transferring the station to the petitioner Society, the decree immediately vitiates the existing license for the operation of Station WOW; for as we have shown (*supra*, pp. 36-40), a license to broadcast cannot subsist without the facilities and the operation of the station which are the very subject matter of the license itself. Even in normal times, when equipment and other

materials are available, the service would be stopped and the license nullified; only after the substantial delay of proceedings before the Commission to obtain a construction permit under Section 319(a), the acquisition of materials and construction of the station pursuant thereto, and the issuance of a new license for the new facilities and a new operation under Section 319(b), could service to the public be restored. *A fortiori,* does the decree have the effect of stopping service and annulling the license at the present time, when, because of war time scarcity, it is impossible to acquire the equipment and materials necessary to build a station. The Commission, moreover, on April 27, 1942, adopted the policy "to grant no application for an authorization involving the use of any materials to construct or change the transmitting facilities of any standard . . . broadcast station." Policy Memorandum Opinion of April 27, 1942, 9 F.C.C. 356. Subsequent modifications permitting construction of a new station in communities not receiving any service would not be applicable (see F.C.C. Statement of Policy, January 16, 1945) since Omaha has three other stations. The unavoidable consequence, therefore, of the court's decree is to expunge an essential broadcast service which the Commission has authorized. Thus, the court, not the Commission is determining whether a broadcast service shall be authorized and continued.

In the second place, besides nullifying the license of WOW, Inc., the decree below determines that if the broadcasting service hitherto carried on is to be revived at all, the license therefor can be granted by the Commission only to the Society, since it alone will have the physical means which are a *sine qua non* for the issuance of a broadcast authorization.

Thus, the decree below presents the Commission with this choice—accept the deletion of a broadcasting service or accept the dictation of the court as to who shall be authorized to carry on the broadcast operation, if it is to be carried on at all. The choice presented is, in fact, no choice at all. Not to accept the determination that the Society shall be

granted a license would involve the onus of terminating an essential public service—more significant than ever in war time. (*Cf. In the matter of the Revocation of License of the Panama City Broadcasting Co.* (*WDLP*), 9 F.C.C. 208, 218-219 (1942)). Yet, to accept the dictation that a frequency shall be assigned, and a broadcast operation authorized, to the Society would involve the abdication of a power entrusted exclusively to the Commission to choose licensees, in the public interest, and would fly in the face of its earlier determination that assignment of the license out of the Society to WOW, Inc. was "in the public interest" (Section 310(b)).

In any case, it is plain that the alternative presented to the Commission makes its choice an involuntary one and almost completely removes the exercise of its administrative discretion. Whichever horn of the dilemma the Commission may be forced to accept, the court has effectively performed the Commission's functions and left it with the power only to give the stamp of formal approval to what has already been decided. This is a plain invasion of the jurisdiction of the administrative body charged with the responsibility of effectuating the congressional purpose of providing "the maximum benefits of radio to all the people of the United States" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217), and of issuing and deleting licenses according to its own exclusive determination that the public interest will thereby be served.

Even if the court were to enter a different judgment and make the facilities available to whichever of the two parties the Commission deemed most in the public interest, so that it could be assumed, contrary to the actual situation, that a choice between the two parties were still available, the Commission would, nevertheless, be hamstrung in its efforts effectively to perform its functions and exercise its unfettered discretion in the choice of licensees. Both of these parties are directed to take all steps to effect the retransfer of the license to the Society. All parties are under legal mandate to promote the retransfer; presumably, none

is free to submit evidence to promote or in any manner advocate the continuance of the operations in the hands of the licensee. Presumably, no party would be free to make either an original argument or to take an appeal from a Commission decision conforming to the Nebraska decree. In a controversy of this kind, it would be serious enough that the parties themselves are handcuffed and required by mandate of the court to present only one side of the case. But it would be intolerable if the federal agency charged with the protection of the public interest in the choice of licensees were itself incapacitated to perform its duty.

C. SINCE THE JUDGMENT BELOW INVOLVES AN INVASION OF THE COMMISSION'S JURISDICTION, THE PRESENT SUIT CANNOT BE MAINTAINED

We have, then, the following situation: The Commission, charged with the affirmative duty of securing the best possible radio service to the public and, to that end, endowed with jurisdiction to chose its own licensees, approves the assignment of license of Station WOW from the Society to WOW, Inc., and authorizes WOW, Inc. to operate the station. The respondent, knowing of the pendency of those proceedings, fails to make any move to intervene before the Commission to object to the transfer of the station, relying instead upon the representations of the Mayor of Omaha, sues in a State court, alleging, *inter alia*, the insufficiency of the showing before the Commission, and on appeal obtains a judgment.

This judgment rests on substantially the same facts as those presented to the Commission and involves a determination of public interest questions, all of which were within the peculiar competence of the Commission and some of which, at least, were plainly determined to the contrary by the Commission in authorizing WOW, Inc. to operate the station "in the public interest." This judgment also nullifies the prior action of the Commission which authorized that operation and usurps its functions by effectively determining when, by whom, and at what rental figure broadcast operations shall be carried on.

Such a judgment is vulnerable since both the questions decided and relief granted impinge upon the administrative functions of the Commission. Courts cannot, under well-established principles, be permitted to undertake to decide and do what the Congress has prescribed to be the responsibility of an expert tribunal. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; Note, 51 Harv.L.Rev. 1251 (1938). Also see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

"Of course, no court can grant an application or authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14. Nor can a court be permitted in any other manner to usurp the functions of the Commission—to circumscribe its exercise of administrative discretion or decide matters confided to it. The determination of the public interest questions affecting radio is "lodged in the Commission. It is the only proper agency to decide these public questions." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938).

1. *The Type of Relief Granted Alone Prevents Maintenance of This Suit.*

As we have shown (*supra*, pp. 60-65), by setting aside the lease of Station WOW's facilities and ordering their return to the Society, the court takes from the licensee the subject matter of the license and vitiates the license.

Entirely apart from any consideration of the public interest questions, determination of which was an essential part of the grounds for the decision, the judgment annuls and sets aside the Commission's order—relief which, under Section 402(a) of the Communications Act, can be granted only by a three-judge Federal court. *Federal Communications Commission* v. *Columbia Broadcasting System of Cal.*, 311 U.S. 132; *National Broadcasting Co.* v. *United States*, 316 U.S. 447. It is immaterial that the Commission's order was permissive and not mandatory. So is it immaterial that the court purported to deal only with "property" and not with the "license", and vitiated the

Commission's order by backing into it rather than by striking head on. By the decree, the Commission's order was as effectively nullified as if the court specifically enjoined the licensee from carrying out the Commission's authorization. "An order [of the Interstate Commerce Commission] may be as effectively annulled by misconstruction as by avowedly setting it aside." *American Express Co.* v. *Caldwell*, 244 U.S. 617, 628.

The test is whether the relief granted forbids what the Commission authorized. Thus, in *Venner* v. *Michigan Central R.R.*, 271 U.S. 127, a minority stockholder sought, in a State court, to enjoin a railroad from entering into joint arrangements for the purchase of locomotives which the Interstate Commerce Commission had authorized. In holding that the suit could not be maintained, the Court said (pp. 130-131):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. *While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. . . . That the order is not mandatory, but permissive makes no difference in this regard.*"

See also *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377; *North Dakota ex rel. Lemke* v. *Chicago & Northwestern Ry.*, 257 U.S. 485; *Baldwin* v. *Starks*, 107 U.S. 463; *State ex rel. Davis* v. *Atlantic Coast Line Ry.*, 103 Fla. 1204, 140 So. 817 (1932); *Southern Ry.* v. *Georgia*, 188 Ga. 569, 4 S.E. (2d) 233 (1939); *Illinois* v. *Illinois Central R.R.*, 324 Ill. 591, 155 N.E. 841 (1927); *St. Louis Connecting R.R.* v. *Blumberg*, 325 Ill. 387, 156 N.E. 298 (1927).

Similarly, even if the relief here granted were meritorious and were predicated solely upon a vindication of asserted private rights not involving questions of public concern, the suit would be no less one to annul the Commis-

sion's order. In *Village of Mantorville* v. *Chicago Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934), the Interstate Commerce Commission had authorized the defendant to abandon part of its line. Thereafter, plaintiff sued in a State court to enjoin defendant from abandoning the line, or for damages, alleging a contract by defendant to continue service on the line. On removal, the Federal court, without passing on the possible right to other relief, dismissed the suit for specific relief, saying (pp. 793-794, 796):

> "The complaint does not in so many words seek to annul or modify the order of the Interstate Commerce Commission, and apparently bases its right to an injunction on the so-called contract right contained in the deed heretofore described, but manifestly the ultimate purpose of the action is to require the defendant to refrain from doing that which the Interstate Commerce Commission in its order stated it might do. . . .
>
> "Public convenience and necessity are not determined by a Commission merely to protect the railroad, but to protect interstate commerce from onerous burdens which may affect the efficiency and the ability of the carrier to perform its duty to the public. . . .
>
> ". . . the vital interest of the United States in supervising the interstate service rendered by this defendant company cannot be suspended and cancelled by a collateral proceeding, which would be the result if the court granted the relief asked by the plaintiff herein."

The view expressed in certain of the railroad cases (see *Pittsburgh & W.Va. Ry.* v. *United States*, 281 U.S. 479. But *cf. Chicago Junction Case*, 264 U.S. 258; *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 420-421) that the nature of the ground relied upon for relief is relevant to whether a suit is one to set aside an order of the Interstate Commerce Commission, misconceives, we believe,

the basic consideration involved. The test is not what contentions are made as a basis for relief, or whether they are pertinent to administrative action in the public interest and might therefore be advanced before the administrative tribunal.[29] Indeed, in many of the cases holding that court

[29] Sec. 1.102 of the Rules and Regulations of the Federal Communications Commission provides:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest. . . ."

The effect of the last clause has been considerably changed as the result of the decision of this Court in *Federal Communications Commission* v. *National Broadcasting Co., Inc. (KOA)*, 319 U. S. 239. Action of the Commission in this respect has not been uniform. Thus, a minority stockholder and holder of an alleged option to purchase stock has been permitted to intervene in a proceeding involving an application for consent to transfer control of a license where he asserted that the transfer was prejudicial to his interest. Petition for Leave to Intervene by Richard G. O'Day, *In the Matter of Application of Arde Bulova for Consent to Transfer Control of Wodaam Corp. (WOV)*, Docket No. 6598, Decision of July 5, 1944. An earlier case is to be distinguished on its facts (*In the Matter of Application of Cosmopolitan Broadcasting Co. for Consent to Assignment of License (WMCA)*, (Order dated November 16, 1943, File No. B1-AL-390). Donald Flamm, formerly held a controlling interest in Station WMCA in New York City. He sold the station to Noble. Flamm and Noble applied to the Commission for consent to transfer. This was granted and accordingly Flamm made the conveyance. Thereafter, Flamm filed a bill in equity against Noble in the Supreme Court of New York County seeking a rescission of the transfer on the ground of coercion in the negotiation (*Flamm* v. *Noble*, Sup. Ct. N.Y. Co., No. 15784, 1943). Still later, Flamm amended his petition in order to present a suit for damages at law rather than a case in equity. Three years after his acquisition of the station and with this suit pending, Noble contracted to transfer the station to Nathan Straus. Noble and Straus applied to the Commission for consent to transfer. Flamm then moved to intervene in this later proceeding albeit he was neither a licensee nor the holder of any interest in a licensee. His stated purpose was to postpone commission proceedings pending disposition of his private suit. The Commission declined to permit this intervention stating that it "had no power to act with respect to these matters and any action it takes in the present proceedings will not affect the court's jurisdiction." By way of dictum the Commission stated that the court had exclusive jurisdiction to decide the

proceedings could not be maintained because their effect would be to nullify action of the Interstate Commerce Commission, the grounds relied upon in the court proceedings were entirely irrelevant, and made expressly so by Congress, to action taken by that Commission in the public interest.

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issues in the pending litigation with respect to the physical properties and other assets of the station, at the same time asserting that the Commission itself had exclusive jurisdiction to determine whether in any particular case the license should be assigned in the public interest. It concluded: "Commission consent to the proposed assignment therefore does not affect any remedy which it is within the court's power to afford."

The case adopts the view of an earlier decision, *In the Matter of Buffalo Broadcasting Corp.*, 9 F.C.C. 31 (1941), where a holder of a contract under which a licensee agreed to give a mortgage on its land, buildings and equipment sought to intervene in proceedings involving a change of location and installation of a new transmitter in order to obtain security on the proposed new equipment and location. The Commission, saying (9 F.C.C. at 32) that "the enforcement" of the contract with respect to security "is a matter over which the Commission has no jurisdiction", dismissed "the petition to be made a party intervenor and for affirmative relief . . . without prejudice to any contract or property right of petitioner or its right to proceed before other tribunals."

The *Buffalo* decision was obviously correct as the Commission is not the tribunal to order specific performance of contracts to give security. Such relief is for the courts to give. But this does not mean that other relief can be given by a State court which will encroach upon the Commission's jurisdiction or nullify action taken by it. Likewise, we do not believe that the general language in the WMCA case can properly be construed as countenancing State court action which will invade the Commission's jurisdiction or amount to a performance by the court of the Commission's functions.

Furthermore, both of these cases represent an enforcement of the basic policy of the act that public interest should be paramount over enforcement of private remedies. As the Commission stated in the Flamm case:

". . . No fact which petitioner proposes to establish will in any way reflect upon the desirability of a transfer to the proposed licensee. Consummation of the transfer is not to be held up, perhaps for years, pending settlement of issues in private litigation unrelated to the proposed operation."

It is also significant that both of these cases involved private issues and in neither, contrary to the instant case, were the questions involved of a public interest character. And see *supra*, note 13, p. 50; note 11, p. 49, for cases where the Commission takes cognizance of facts reflecting upon the financial responsibility and character of proposed licensees.

See *e.g., Venner* v. *Michigan Central R.R.*, 271 U.S. 127. The correct test, therefore, is whether Congress intended to permit the nullification of administrative action taken in the public interest, whatever the ground relied upon.

The correct result, we believe, was reached in the *Village of Mantorville* case (8 F.Supp. 791, *supra*), holding that relief, nullifying Commission action, can be given only by the appropriately designated Federal courts. As stated in *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 420-421, actions cannot be brought in a State court where

> ". . . affirmative relief was prayed directing, either that the order be set aside, or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be performed, relief which, it was held, would operate practically to set aside the order of the Commission."

In any event, the doctrine of the *Pittsburgh & W.Va. Ry.* case, even if deemed satisfactory for the Interstate Commerce Commission, is not lightly to be extended to the field of broadcasting. As we have argued (*supra*, pp. 30-33), broadcasting has a cultural, social and political significance which transcends traditional concepts of the nature of "public interest". It is one thing for the courts to hold that suits seeking relief inconsistent with the orders of the Interstate Commerce Commission are not suits to set aside those orders, maintainable in a Federal three-judge court, on the assumption that Congress did not intend that Commission to concern itself with the intra-corporate matters put in issue. It is quite another thing, however, to apply the same assumption to the Federal Communications Commission.

On this issue, there are significant differences between the field of radio broadcasting and that of rail transportation. In the field of freight and passenger transportation, the dominant concern was to prevent excessive or discriminatory rates, and while the scope of control has gradually been enlarged, the Interstate Commerce Commission was

never much concerned with identity of ownerships, or with character, experience and like qualifications (*cf.*, Cushman, *The Independent Regulatory Commissions* (1941), pp. 37 *et seq.*). In the field of radio, on the other hand, the identity of the station owner, his character, financial stability, experience and skill in the handling of entertainment, and integrity in the handling of news and ideas is of paramount concern to the Communications Commission, and there is no basis for a presumption that Congress did not intend the Commission to concern itself with what, in the case of the Interstate Commerce Commission's jurisdiction, might well be regarded as private issues. It would seem that all such issues should be treated as primarily for Commission decision, and that suits, whatever the ground relied upon, to nullify action of the Commission should be limited to the Federal courts pursuant to Section 402(a) of the act.

But whether or not the relief granted by itself makes this suit one to set aside and annul the Commission's order within Section 402(a), it still is the type of relief which cannot be granted by a State court. And the *Pittsburgh & W.Va. Ry.* case does not decide the contrary. To permit such relief to be granted by other than a three-judge Federal court in reviewing the Commission's orders, would effectively thwart federal public policy in the control of radio.

It has been a long-established principle of public policy that courts, in suits to enforce private remedies, will deny relief which will prejudice the public interest. Thus, courts of equity will not, for example, order specific performance of a contract to build a railroad by a specific route (*Hoard* v. *Chesapeake & Ohio Ry.*, 123 U.S. 222, 236), or to maintain machine ships at a particular location (*Texas & Pac. Ry.* v. *Marshall*, 136 U.S. 393, 405), or grant an injunction against building a depot in violation of a contract (*Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 497; *Armour & Co.* v. *Dallas*, 255 U.S. 280; *Seaboard Air Line Ry.* v. *Atlanta B.& C. R.R.*, 35 F.(2d) 609 (C.C.A. 5th, 1929). See also *Elliott Nursery Co.* v. *Duquesne Light Co.*, 281 Pa. 166, 126 Atl. 345 (1924). Similarly, rights against property used in carrying out a public franchise will not be enforced so as

to separate property from the franchise and thereby prejudice public interest in the continuation of the service. *Gue* v. *Tide Water Canal Co.*, 24 How. 257, 263; *East Alabama Ry.* v. *Doe ex dem. Visscher*, 114 U.S. 340, 351; *Ackroyd* v. *Winston Bros. Co.*, 113 F. (2d) 657, 659-660 (C.C.A. 9th, 1940); *Louisville N.A.& C.Ry.* v. *Boney*, 117 Ind. 501, 506-509, 601, 20 N.E. 432 (1889); *Brady* v. *Johnson*, 75 Md. 445, 449, 26 Atl. 49, (1892); *Northern Pac. R.R.* v. *Shimwell*, 6 Mont. 161, 164-165, 9 Pac. 889 (1886); *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig. W.P. & I.Co.* v. *Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868). Thus the decision in the *Village of Mantorville* case was sound whether or not the ground relied upon was correct.

The Communications Act should, we submit, be interpreted in accordance with this general policy, which would seem peculiarly appropriate in the congressional scheme for a single unified control of radio. By the Communications Act, Congress declared its purpose "to maintain the control of the United States over all the channels of interstate and foreign radio transmission" and "to provide for the use of such channels . . . under licenses granted by Federal authority" (Section 301(a)). For this purpose and "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide . . . radio communication service," it established a single expert body, the Commission (Section 1). The Commission was charged with securing "the larger and more effective use of radio" (Section 303(g)) and endowed with plenary authority to choose licenses "in the public interest" to that end.

Congress, we believe, did not intend that these purposes and powers should be thwarted by private law suits, that the federal control thus established over radio channels should be so weak as to permit contradictory control over those channels like that involved in the relief below, or that the functioning of the expert tribunal should be subject to varied dictation of State courts. Such a result would nullify the basic purpose of Congressional action—to ensure that public interests were made paramount to private. It

would not only be contrary to the strong common law policy against relief prejudicial to the public interest (see cases, *supra*, p. 37), reinforced by Congressional act in the case of radio, but would destroy the integrity of the administrative tribunal charged with carrying out that Congressional public policy. Such disruption of both common law policy and legislative command, we submit, should not be permitted to stand. *Cf. New York* v. *New York Central R.R.*, 275 N.Y. 287, 9 N.E.(2d) 931 (1937); *Ford* v. *Oregon Elec. Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); see *Beasley* v. *Texas & Pac. Ry.*, 191 U. S. 492, 497-98. State courts cannot be permitted to give commands which conflict with regulatory action of Congress as exercised through federal administrative agencies. See Note 51 Harv.L.Rev. 1251, 1257-58 (1938).

The only basis indicated (as by *Pittsburgh & W.Va. Ry.* v. *United States*, 281 U. S. 479) for holding that particular suits to nullify administrative action were not to be considered as suits to "set aside" an order, for the purpose of provisions similar to Section 402(a), is that the issues raised were unrelated to the discharge of the functions placed upon the administrative body. If that is so—if the issue set up is irrelevant to the determination of the public interest, convenience and necessity in a particular matter—then certainly it should not be recognized as the basis for undoing that administrative determination. The result most consistent with the paramount federal policy involved in the field of broadcasting is to restrict jurisdiction over suits to nullify Commission action to the tribunals prescribed by Congress in Section 402(a), and before which Congress has authorized the United States to be made a party defendant.

Such a result, we believe, gives due regard to both public and private interests and affords an appropriate realization of each. Nor does this result in any way conflict with the reservation of common law remedies in Section 414 of the act. This provision was drawn from and is peculiarly pertinent to regulation of common carriers. It was not present in the Radio Act of 1927 and appears in the Communications Act of 1934 only as the result of the trans-

fer of regulation of common carriers to which it had previously been applicable.[30] In view of the purpose of the Communications Act to centralize authority and to grant additional authority (Section 1), this provision cannot be construed to reduce federal control over radio below what it was under the Radio Act of 1927 when the regulation of radio was separate. Moreover, it is clear that the provision has no application to a suit which intimately involves and, indeed, conflicts with the policy of the act itself. *Texas & Pac. Ry* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446-447; *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195, 196.

On any theory, moreover, the suit would seem to be one requiring the joinder of the United States within the principles announced in *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U. S. 377, 382. The Court there pointed out:

> ". . . there are . . . two fundamental objections to the jurisdiction. First, the United States, an indispensable party to a suit to restrain or set aside orders of the Commission, was not joined, and could not be, for it had not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. . . . As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal."

2. *In Any Event, the Public Interest Questions, Decision of Which Was Relied Upon as Essential Bases of the Judgment, In Addition to the Relief Granted, Prevent Maintenance of This Suit*

Whether or not the relief granted by itself prevents maintenance of this suit, on the theory either that it involves setting aside a Commission order contrary to Section 402(a), or runs counter to paramount federal policy for the control of broadcasting, the judgment must be set aside since it was founded upon the decision of public interest questions.

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[30] See Act of February 4, 1887, to Regulate Commerce, 24 Stat. 379 (as amended by Section 7 of the Act of June 18, 1910, 36 Stat. 539, 544-545), Section 22.

From the analysis of the Nebraska court's decision given above (pp. 44-58) and the Commission decisions there cited, it is clear that the Commission had a paramount concern, from the standpoint of public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court, ostensibly from the standpoint of supposed private rights. The data on past earnings, rental payments, the security behind the transaction, Gillin's position as manager of the station, his status as a stockholder and his predominant position in the lessee corporation, all these factors, relied on by the court, were clearly relevant to the Commission's functions under the language of the Communications Act and involved questions which the Commission itself was called upon to take into account and weigh in authorizing the transfer of the station. And these factors, as well as others relied upon by the court in evaluating the leased property, required the investigation, analysis and appraisal which only the expert body in a highly technical and specialized field is qualified to give. This, we seriously submit, is evident from the opinion below.

Reliance upon the decision of even a single public interest question as an essential ingredient of the court's judgment would seem to require its reversal. In this case, there are no separate or alternative bases for the decision (see *supra*, pp. 44-60) and every ingredient of the judgment involves the decision of such questions.

In another aspect of the case, the court's decision involves an invasion of the Commission's sphere and the determination of public interest questions. If permitted to stand, it would effectively prohibit (certainly so far as the transfer of any broadcast station in Nebraska may be involved) any future transfer which does not meet its own standards of adequacy of price, financial stability of the transferee, the compensation of the transferee's manager and his present and past interest in the station, etc. No matter how firm a judgment the Commission may reach as to the desirability of a transfer in the public interest, hereafter its discretion would be limited by the conclusions

of the Nebraska court. And presumably, in the future, in a multitude of cases, it would be bound by the conclusions of the courts of all States. The decision thus would remove a large and essential area within which the Commission's determination of public interest may operate and would tend to break down Congressional and regulatory standards of great significance to the public.

These questions, therefore, were matters falling within the primary jurisdiction of the Commission to determine. The so-called "doctrine of primary jurisdiction" is clearly applicable here. It has been applied to such functions as those of the Interstate Commerce Commission in the field of railroad rates (*Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285; *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422), and pipeline joint rate divisions (*Marony* v. *Applegate*, 266 App. Div. 412, 42 N.Y.Supp.(2d) 768 (1943); the United States Shipping Board in the field of ocean carriage (*United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474); the Civil Aeronautics Board in the field of airplane flight regulations (*Adler* v. *Chicago & Southern Air Lines, Inc.*, 41 F.Supp. 366 (D.Mo. 1941); and to the various boards dealing with labor relations (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Stanley* v. *Peabody Coal Co.*, 5 F. Supp. 612 (D. Ill. 1933); *Montana State Federation of Labor* v. *School Dist. No. 1*, 7 F.Supp. 82 (D. Mont. 1934). *Cf. Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210.

The theory underlying the rule was perhaps best stated in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but

the *character of the controverted question and the nature of the inquiry necessary for its solution.* To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.*"

The rule would seem peculiarly applicable to the functions vested in the Communications Commission—since the Communications Act gave the Commission "not niggardly but expansive powers" in a field "the dominant characteristic of which was the rapid pace of its unfolding" and a need for special vigilance to "encourage the larger and more effective use of radio in the public interest". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Here, the plaintiff should have submitted his public interest questions to the Commission for its expert consideration, and if dissatisfied with its action and desirous of relief nullifying it, appealed to the Federal courts pursuant to section 402(a). *Cf.*, concurring opinion of Lehman, J., in *New York* v. *New York Central R.R.*, 275 N.Y. 287, 296-297, 9 N.E.(2d) 931 (1937); *Ford* v. *Oregon Elec. Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F.Supp. 791 (D. Minn. 1934). See also *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 497-498.

Conclusion

We submit, therefore, that the judgment below should not be permitted to stand. The decision rests upon public interest questions which were either directly involved in the Commission's decision approving the transfer, or which, if presented to the Commission would have been passed upon as relating to the ultimate issue of "public interest, convenience or necessity", pending before the Commission. The judgment, therefore, invades the Commission's jurisdiction, and annuls and sets aside the Commission's order contrary to Section 402(a) of the Act. The suit, therefore, could not be maintained in a State court, for in addition to nullifying administrative action contrary to the federal scheme for a single, unified control of broadcasting, the decree is predicated upon the decision of public questions directly at odds with that of the administrative body itself. It is submitted that such a thwarting of federal public policy should not be permitted, and that the judgment should be reversed with directions that the petition be dismissed.

Respectfully submitted,

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February, 1945

APPENDIX A

APPLICABLE SECTIONS OF THE COMMUNICATIONS ACT

(150 Stat. 189, 47 U. S. C., Section 151)

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SECTION 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

SECTION 3. (b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, includ-

[1] The provision relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc.". Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

ing all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

SECTION 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. . . .

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SECTION 303. (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(r)[17] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SECTION 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

SECTION 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be

[17] This subsection was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937; 50 Stat. 191.

for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

SECTION 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: . . .

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served

by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding.

(b)(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

SECTION 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without

the approval of the Commission. . . . Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstanee arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

APPENDIX B

LICENSE OF STATION WOW, DATED NOVEMBER 6, 1942, WHICH COMMISSION AUTHORIZED TO BE ASSIGNED FROM WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY TO RADIO STATION WOW, INC.

File No. B4-S-686
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Modified as of November 6, 1942.

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission; and further subject to conditions set forth in this license, the LICENSEE WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning December 1, 1942 (3 a. m., Eastern Standard Time), and ending June 1, 1944 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.82 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 107.7 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue,	Lat.	41°	19′	00″	North,
Omaha, Nebraska.	Long.	95	59	52	West.

and is described as follows: WESTERN ELECTRIC, Type D-96847 Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Type—guyed uniform cross section vertical radiator; vertical lead, 454 feet; overall height, 458 feet. Ground system: 120 radials #10 copper wire each 400′ long buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with specifications dated 8-8-39, said specifications to be posted by the licensee with this license (Sec. 3.401).

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the fre-

quency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 6th day of November, 1942.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]
bdr

APPENDIX C

LICENSES OF STATION WOW, ISSUED TO RADIO STATION WOW, INC., EFFECTIVE FEBRUARY 17, 1943, AND JUNE 1, 1944, RESPECTIVELY

File No. B4-Z-1494
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Modified as of February 17, 1943.

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE RADIO STATION WOW, INC. is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning February 17, 1943, and ending June 1, 1944 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.93 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 104 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue, Omaha, Nebraska.	Lat.	41°	19′	00″	North,
	Long.	95	59	52	West.

and is described as follows: WESTERN ELECTRIC, Type D-96847, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Guyed uniform cross-section vertical radiator; height of vertical lead, 454′; overall height above ground level, 458′. Ground system consists of 120 radials #10 copper wire, each 400′ long, buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with specifications dated 8-8-39, said specifications to be posted by the licensee with this license (Sec. 3.401).

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the fre-

quency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 17th day of February, 1943.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]
tgn

File No. B4-R-686
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE RADIO STATION WOW, INC. is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning June 1, 1944 (3 a. m., Eastern Standard Time), and ending May 1, 1946 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.93 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 104 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue,	Lat.	41°	19′	00″	North,
Omaha, Nebraska.	Long.	95	59	52	West.

and is described as follows: Western Electric, Type D-96847, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Guyed uniform cross-section vertical radiator; height of vertical lead, 454′; overall height above ground level, 458′. Ground system consists of 120 radials #10 copper wire, each 400′ long, buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with attached specifications.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such

hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 23rd day of May, 1944.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]

wrm

70226-4

B4-R-686 WOW 5-23-44

SPECIFICATION "A-3-a" MODIFIED

(Formerly Specification "B")

xxx (each) tower shall be painted throughout its height with alternate bands of international orange and white, terminating with international orange bands at both top and bottom. The width of the international orange bands shall

be from 30' to 40 feet. The white bands shall be approximately one-half the width of the international orange bands.

For night marking there shall be installed at the top of (each) tower a three-hundred m/m electric code beacon equipped with two five-hundred watt lamps (both lamps to burn simultaneously) and aviation red color shades. In addition, the code beacon (beacons) shall be equipped with a flashing mechanism producing not more than forty flashes per minute with a luminous period of one second and a period of darkness of one-half second, but not less than twenty flashes per minute with a luminous period of two seconds and period of darkness of one second.

On levels at approximately two-thirds and one-third of over-all height of the (each) tower, there shall be installed at least two one-hundred watt lamps, or equal illuminants, enclosed in aviation red fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light at each level from aircraft at any angle of approach.

All lighting shall be exhibited from dusk to dawn.

Nothing contained herein shall be construed as a finding by the Commission on the question of additional marking or lighting for the antenna system should future conditions require. Licensee expressly agrees to install such marking or lighting as the Commission may require under the provisions of Section 303 (q) of the Communications Act of 1934, as amended.

In the event further developments should indicate the need for additional marking, a 24-inch rotating beacon on the highest station building and/or a radio marker beacon may be required.

APPENDIX D

BALANCE SHEET AND INCOME STATEMENT OF STATION WOW, SUBMITTED BY WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, ASSIGNOR, IN CONNECTION WITH APPLICATION FILED IN THE COMMISSION FOR CONSENT TO ASSIGNMENT OF LICENSE FOR RADIO STATION WOW, INC. (FILE No. B4-AL-354) (SEE R. 376, 386)

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

FCC Form 329

(March 1941—supersedes FCC Form 706)

Exhibit 3

BALANCE SHEET

As at September 30, 1942

Show all amounts to the nearest dollar only, i.e., do not report cents.

Executed by or on behalf of:

W.O.W. Radio Station owned and operated by Woodmen of the World Life Insurance Society.
(Exact name of person or entity whose balance sheet appears herein)

Insurance Building, Omaha, Nebraska
(Regular business address)

I hereby certify that I am the person for whom this balance sheet is filed with the Federal Communications Commission or am authorized to execute this document for that person.[1] I further certify that I have reviewed carefully

[1] May be signed by a person other than one for whom the balance sheet is prepared if accompanied by appropriate explanation of authority to do so, as well as authenticated copies of documents on which such authority rests if such documents are not on file with the Commission. If on file, reference to such documents may be made in lieu of submitting copies thereof. If submitted as part of an application it may be signed only; if submitted separately, it must be signed and sworn to before a proper officer.

all items on this balance sheet and that it reflects the true, accurate, and complete financial condition of the person for whom filed as at the date shown above, appropriate accounting classifications alone excepted.

FORREST NEWBERRY,
(Signature)

Secretary
(Relationship to person for whom filed)

Insurance Bldg., Omaha, Nebraska
(Regular business address of person signing)

Subscribed and sworn to before me this 3rd day of October, 1942.

(SEAL) CLARA CHESNEAU,
Notary Public

My commission expires June 28, 1943.

Must be submitted in triplicate. Swear to at least two copies.

GENERAL BALANCE SHEET—ASSET SIDE

Line No.	Particulars		Amount
1	CURRENT ASSETS AND ACCRUALS		
2	Cash		$ 106.00
3	Temporary cash investments		
4	Notes and accounts receivable		47,935.00
5	Other current assets		
6	Total current assets and accruals		$
7	INVESTMENTS—BROADCAST[2]		
8	Tangible property owned and devoted exclusively to broadcast service (for description see Schedule 4 of FCC Form No. 324)	$108,591	
9	Less depreciation allowance	56,939	$ 51,652.00
10	Intangible property owned and devoted exclusively to broadcast service (for description see Schedule 5 of FCC Form No. 324)	$	
11	Less amortization allowance (Goodwill)		$ 1.00
12	Total Investments—Broadcast		$
13	INVESTMENTS—NONBROADCAST		
14	Land		$ 14,129.00
15	Buildings and extension in process	$ 43,974	
16	Less depreciation allowance	6,883	$ 37,091.00
17	Other fixed assets		
18	Securities 434 Shares Broadcast Music Inc		2,170.00
19	Other investments		
20	Intangible property	$	
21	Less amortization allowance		$
22	Total Investments—Nonbroadcast		$
23	AMOUNTS RESPECTING AFFILIATED INTERESTS		
24	Notes and accounts receivable from affiliated companies		$
25	Notes and accounts receivable from partners, stockholders, officers and employees		
26	Investments in securities of an advances to affiliated companies		

[2] The net amount of these items must agree with the depreciated value in schedule of inventory in cases of applications for assignment of construction permit or license and transfer of control.

27	Advance to partners, stockholders, officers and employees		
28	Total amounts respecting affiliated interests	$	
29	PREPAYMENTS, DEFERRED CHARGES, AND UNCLASSIFIED DEBIT BALANCES		
30	Prepaid payrolls	$	
31	Other prepayments Insurance	$	1,500.00
32	Capital stock discount and expense		
33	Unamortized debt discount and expense		
34	Other deferred charges and unclassified debit balances		
35	Total prepayments, deferred charges and unclassified debit balances	$	
36	OTHER ASSET SIDE AMOUNTS		
37	Other assets	$	
38	Total asset side amounts		$154,584.00

GENERAL BALANCE SHEET—LIABILITY SIDE

Line No.	Particulars		Amount
39	CURRENT LIABILITIES AND ACCRUALS		
40	Unpaid Payrolls		$ 6,573.00
41	Notes and accounts payable		10,649.00
42	Matured long-term debt unpaid		
43	Accrued interest, rents, and similar items payable		
44	Federal income and other taxes payable		
45	Other current liabilities and accruals		
46	Total current liabilities and accruals		$ 17,222.00
47	LONG-TERM DEBT		
48	Bonds actually issued	$	$
49	Deduct: Bonds reacquirred	$	$
50	Other long-term debt		$
51	Total long-term debt		$
52	PROVISION FOR DEFERRED PAYMENTS, DEFERRED CREDITS AND UNCLASSIFIED CREDIT BALANCES		
53	Provision for employee pensions and welfare		$
54	Other deferred credits and unclassified credit balances		$
55	Total provisions for deferred payments, deferred credits and unclassified credit balances		$
56	AMOUNTS RESPECTING AFFILIATED INTERESTS		
57	Notes and accounts payable to affiliated companies		$
58	Notes and accounts payable to partners, stockholders, officers and employees		
59	Advances from affiliated companies		
60	Advances from partners, stockholders, officers and employees		
61	Total amounts respecting affiliated interests		$
62	CAPITAL (OR NET WORTH)		
63	(a) For a corporation:		
64	Capital stock—Issued	$	
65	Less treasury stock		
66	Balance, capital stock outstanding		$
67	Capital stock, subscriptions and installment purchase commitments		
68	Total capital stock		$

69	Surplus—		
70	Capital Surplus—Paid in	$	
71	Arising from revaluation		
72	Other surplus amounts		
73	Total capital surplus	$	
74	Earned Surplus—Reserves established under requirements in contracts	$	
75	Reserves for contingencies and other discretionary purposes	$	
76	Unappropriated earned surplus (deficit indicated by red)		
77	Total earned surplus	$	
78	Total capital stock and surplus amounts	$	
79	(b) For an individual or a partnership:		
80	Proprietorship or partnership capital	$	
81	Undistributed profits (deficit indicated by red)		
82	Total net worth		$137,362.00
	Total liability side amounts		$154,584.00

A (1) Nature and amount of contingent liabilities not included in the balance sheet..... None

(2) Amount per share of cumulative dividends in arrears ..... None

(3) Amount of default in principal, interest, or sinking-fund provisions of funded debt..... None

(4) Explain the nature of any contingent liability shown and describe fully the reason for dividends in arrears and default in payment of funded debt:

.....

.....

.....

B (1) Was any asset shown on the foregoing balance sheet acquired in any manner other than:

(1) through purchase with funds acquired in the ordinary course of business, or

(2) by issuance of capital stock, or (3) by issuance of evidence of indebtedness shown on the balance sheet? Answer: No.

(2) If the answer is "yes", describe each such asset and state the time and manner of acquisition and from whom acquired:

.....

.....

.....

C (1) Is this a consolidated balance sheet, i.e., are amounts included with respect to more than one company or other person? Answer: No.

Note: For the purpose of reconciliation of this statement with the one furnished to F.C.C. at the end of the year it should be stated that in this statement rates of depreciation are those used by the Federal Revenue Bureau. Rates of depreciation used in annual statement to F.C.C. show tangible property totally written off as required by the Insurance Departments governing Fraternal Life Insurance Societies.

(2) If the answer is "yes", identify each person whose amounts are included:

.....

.....

.....

WOW—EXHIBIT 2.

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

FCC Form 328
(March 1941—supersedes FCC Form 705) Exhibit

Federal Communications Commission
Oct 8 - 1942
Office of Secretary

INCOME STATEMENT

Executed by or on behalf of: Radio Station W.O.W. Owned and operated by

Woodmen of the World Life Insurance Society.
(Exact name of person or entity whose income statement appears hereon)

17th & Farnam Streets, Omaha, Nebraska
(Regular business address)

For the period

Begun Jan. 1, 1942 and ended Sept. 30, 1942

Show all amounts to nearest dollar only, i. e., do not report cents.

Line No.	Particulars		Amount
(1)	(2)		(3)
1	INCOME		
2	Salaries, wages, commissions		$
3	Rents		
4	Dividends		
5	Interest		
6	Broadcast income (Time)		426,408.93
7	Other income (itemize):		
8	Sale of Talent	$ 22,920.47	
9	Production, etc.	34,956.36	
10	Remote facilities	125.50	
11	Incidental revenues	2,795.85	
12			
13			
14			60,798.18
15	Total income (lines 2 to 14, inclusive)		$487,207.11

16	DEDUCTIONS FROM INCOME		
17	Interest		$ .....
18	Rents		.....
19	Taxes (other than Federal income tax)		.....
20	Other deductions from income (itemize):		
21	Technical Expenses	$ 48,089.35	
22	Program Expenses	81,353.29	
23	Selling Expenses	48,182.62	
24	General and Administrative		
25	Expenses	100,600.70	
27	Total (lines 17 to 26, inclusive)		$278,225.96
28	Net income for the period before Federal income tax (line 15 minus line 27)		None
29	Federal income tax	None	
30	Contractual reservations of income	None	
31	Total Federal income tax and reservations (lines 29 to 30)		None
32	NET INCOME FOR THE PERIOD (line 28 minus 31)		$208,981.15

Must be submitted in triplicate. Swear to at least two copies.

APPENDIX E

BALANCE SHEET OF RADIO STATION WOW, INC., ASSIGNEE, SUBMITTED IN CONNECTION WITH THE APPLICATION FILED IN THE COMMISSION FOR CONSENT TO ASSIGNMENT OF LICENSE FROM WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (FILE NO. B4-AL-354) (SEE R. 376, 406)

RADIO STATION WOW INCORPORATED

OMAHA, NEBRASKA

Balance Sheet

October 20, 1942

Assets

Cash	$ 75,500
Guaranteed accounts receivable	25,000
Total Assets	$100,500

Liabilities

Capital Stock—Common (1000 shares) Par	$ 1,000
Preferred Stock—Class A (750 shares) Par	750
Preferred Stock—Class B (250 shares) Par	250
Surplus Paid-in	73,500
Surplus—Donated	25,000
Total Liabilities	$100,500

State of Nebraska }
County of Douglas } ss

I, John J. Gillin, Jr., President of Radio Station WOW Incorporated, do hereby certify that the foregoing statement sets forth correctly the financial condition of the afore-mentioned corporation.

John J. Gillin, Jr.

Subscribed and sworn before me this 20th day of October, 1942.

Clara Chesneau.

No. 593

Office - Supreme Court, U. S.
FILED
APR 18 1945

In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.

Petitioners

v.

HOMER H. JOHNSON

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF FOR PETITIONERS

JAMES LAWRENCE FLY
Attorney for the Petitioners

FRANCIS P. MATTHEWS
RAINEY T. WELLS
MONROE OPPENHEIMER
PETER SHUEBRUK
RAYMOND M. CROSSMAN
EARL CLINE
ROBERT W. DEVOE
PAUL P. MASSEY
WILLIAM P. KELLEY
Of Counsel

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation, DEE. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.
Petitioners

v.

HOMER H. JOHNSON
Respondent

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The Government's brief serves to project a narrow issue for decision—whether reversal of the judgment below should rest upon correcting a basic jurisdictional defect or upon establishing a complicated, procedural strategy.

From beginning to end, this case has involved a going radio station, and only a going radio station, the most important element of which—indeed its very essence—is the federally granted license. The whole case revolves about and depends upon that license.

One basic principle is clear: that the Nebraska Court cannot cancel the Commission's license or otherwise interfere with its licensing functions. Thus, as the Government states (Brief of United States, pp. 12 *et seq.*), the judgment below is plainly defective not only in purporting to void the license and order a retransfer thereof, but in attempting to control the parties in their presentation of the matter to

the Commission: if the judgment could go so far, the Commission would be seriously handicapped in discharging its responsibility of obtaining facts and choosing licensees.

Restricting the form of the judgment to apply only to the licensed facilities, as suggested by the Government, does not save it. The licensed facilities have never been separately projected as an issue; on the contrary, they have been involved only in association with the license, from which they derive their value. The case, and transactions involved in it, have been treated throughout on that basis by all parties: by the petitioners, in transferring a going operation—in conditioning the transfer of facilities upon the assignment of the license (Ex. 1 to Ans., R. 21, 23); by the Commission, in predicating its approval of the assignment of license as required by Section 310(b) of the Act upon the transfer of a going operation (Ex. 32, R. 661, 662 A); by the respondent, in seeking the return to the Society of a going radio station—license as well as licensed facilities, particularly the license (R. 1, 10); by the court, in reaching its decision (R. 745), in particular in its finding of inadequacy of consideration (R. 755-760) which can rest only on the value attributed to the license—to the monopolistic privilege flowing therefrom; by the court, in its judgment, as well, acting directly both on the license and the licensed facilities, as well as compelling the parties to act with respect thereto (R. 744, 745).

Limiting the judgment to the licensed facilities (R. 794, 797) does not alter the case in any substantial respect. For the license remains the real subject matter of the litigation. The licensed facilities are important only for the impact they have on the license—only as a handle for accomplishing indirectly but effectively what cannot be done directly. The court is thus enabled to wag the dog by its tail. For the impact of the judgment as to the licensed facilities upon the Commission's functions is little different than a judgment directly against the license. By ripping the licensed properties out from beneath the license, it kills the license itself, and constitutes an equally serious impairment of

the Commission's functions. So much is plain and conceded by the Government.

The Government, however, strangely tolerating this interference, argues that such a result is within the power of the State court to effectuate (Brief of United States, pp. 7-8, 16-19). This conclusion cannot be supported. It rests upon an abstract distinction between "physical property" and "license"— a "jurisprudence by conception" which ignores vital distinctions. And the Government, accordingly, ignores the real character of this case. The analogies cited (pp. 5-6) are inapplicable to this case; the arguments advanced do not sustain the judgment in this case. It makes this contention, indeed, only to turn once again to a recognition of the obvious weakness in this position and to propose to meet it by an elaborate scheme of procedure (pp. 14 *et seq.*). The same basic principle invalidating the court's direction with respect to the license and the parties' duty to effect the issuance of a new license to the Society invalidates the equally substantial barrier against the integrity and freedom of administrative exercise of the licensing functions resulting from the judgment as to the licensed facilities. Indeed, the elaborate but unworkable procedural maneuvers suggested by the Government (pp. 19-22) to keep the license and licensed facilities together are designed to achieve the very objectives of maintaining unimpaired the functions of the Commission and preserving public interest in continuity of service. And realization of these objectives requires a surer foundation than the discretion of the State court. Nothing less than a denial of the court's jurisdiction to give a judgment so encroaching upon administrative action and so prejudicial to public interest will serve. The accommodation of private and public interest, judicial and administrative authority and State and Federal jurisdiction can best be achieved in the situation before us by limiting the respondent to an action for damages.

Moreover, since the finding of inadequacy of consideration involves the determination of matters beyond the

jurisdiction of the court below to determine, the judgment resting thereon falls.

Finally, and regardless of the court's jurisdiction, the finding of inadequacy of consideration is intermingled with conclusions of law upon federal questions and is without supporting evidence. Under these circumstances this Court will review the record to prevent denial of a federal right on an insupportable basis.

I

THE STATE COURT CANNOT CANCEL OR OTHERWISE DEAL WITH THE LICENSE OR DIRECTLY OR INDIRECTLY INTERFERE WITH THE LICENSING FUNCTIONS OF THE COMMISSION

One basic principle is clearly established: the State court cannot cancel or otherwise deal with a broadcasting license issued by the Commission, or encroach upon its jurisdiction by impairing in any way its freedom or ability to discharge its licensing functions. To permit any such interference with the Commission's action would countenance the assumption of jurisdiction by a State court which has been confided by Congress to a centralized, expert, administrative control in the interests of protecting and fostering the public interest in the use of radio. Section 402 of the Communications Act sets out the limits of judicial control of Commission licensing functions. And attempts at judicial control not in accordance with those prescribed procedures, whatever the means employed or grounds relied upon, must fall.

In *Federal Communciations Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, the Court said (pp. 133, 134):

> "In so far as action of the Federal Communications Commission is subject to judicial review, the Act bifurcates access to the lower federal courts according to the nature of the subject matter before the Commission. . . . Therefore as to the general class of orders dealt with by Section 402(a) jurisdiction

rests exclusively in the appropriate district court, specially constituted, with direct appeal to this Court."

Thus, it is conceded that the direction in the judgment below that "the transfer of the license to operate the station be vacated and set aside" and "that the license to operate the station be returned" (R. 745) cannot stand.[1] This is an attempted exercise of power by the Nebraska Court which it does not possess. It is an attempt to give relief by way of setting aside an order of the Commission in the exercise of its licensing functions.

The judgment not only purports to set aside the license and order its return to the Society, but directs the parties "to do all things necessary for that purpose" (R. 745). As the Government brief points out (p. 13), the judgment not only prevents the parties from making a full presentation to the Commission, but impedes the Commission in securing the full information required by the Act. Radio Station WOW, Inc. would even be prevented from informing the Commission that more than 20% of the Society's stockholders had become aliens, thus disqualifying the Society under the statute (Section 310(a)(4)) from holding a license. Moreover, by imposing a legal duty upon the parties to effect the issuance of a license to the Society, the Court has in large measure already determined who the licensee shall be. Not only, therefore, is the Commission disabled from discharging its responsibility in the choice of licensees, but the court has performed part of its functions. Here also there is a violation of the basic principle forbidding impairment of the Commission's licensing functions.

The same principle, we submit, invalidates the judgment below, even if, as suggested by the Government, it is limited to the licensed facilities—to requiring that they be transferred to the Society.

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[1] Not only did the Nebraska Supreme Court, in disposing of the Motions to Dismiss and for the Rehearing filed by Petitioners (R. 769, 775, 778, 782) fail to amend its original judgment, as stated in the Government's brief (p. 4), but it expressly "adhered to" its former judgment (R. 794).

II

BY TAKING THE LICENSED FACILITIES OUT FROM UNDER THE LICENSE, THE JUDGMENT BELOW IMPAIRS THE LICENSING FUNCTIONS OF THE COMMISSION

A. THE SUBJECT MATTER OF THIS LITIGATION IS A GOING RADIO STATION, PARTICULARLY ITS LICENSE; LIMITATION OF THE JUDGMENT TO THE LICENSED FACILITIES DOES NOT SUBSTANTIALLY ALTER ITS PURPOSE OR EFFECT

This case has throughout involved a going radio station—and nothing else. The most important element of that station is its federally granted license. Without the license the property is so much acreage and salvageable equipment. As the Government's brief, with appropriate understatement, says (p. 15):

> ". . . the station as an economic entity includes the license, and the major part of its value depends upon the license. Even the physical property is worth much more as an operating unit than as salvage."

We ignore the real nature of this case unless it is realized that what is at issue is the disposition of a going radio station, the very essence of which is its license.

The case has, from beginning to end, been treated by all concerned on that basis. The *petitioners*, the Society and WOW, Inc., made an agreement for the transfer only of a going radio station (R. 21 *et seq.*); the transfer of the facilities was expressly made to hinge upon the contemporaneous assignment of the license with Commission approval (Ex. 1 to Ans., R. 21, 23, par. 2).

The *Communications Act* throughout reveals the interdependence of license and licensed facilities (Petitioners' Brief, pp. 37-39).[2] The specific statutory provision for assignment of licenses, Section 310(b) of the Act, which has been applied and is involved in this case, is predicated upon and comes into operation only upon the transfer of a going radio station. A license cannot be assigned under that provision *in vacuo*. It can be assigned only in associa-

[2] See *infra*, fn. 4, p. 18.

tion with the transfer of a station with full facilities—with the transfer of the particular facilities specified in the license. Were a new operator to seek a frequency used by another, but to set up different facilities—and even the same equipment in a different operation—he would have to apply for a construction permit and thereafter for a new license; the other's license could not be "assigned" to him. *Hearst Radio Inc.*, 7 F.C.C. 292, 294 (1939); *City of Atlantic City*, 7 F.C.C. 485, 489 (1939). This is but the application to broadcasting of the established rule treating a franchise to render a public service and the property devoted to that service as a unity (*infra*, pp. 22-34).

The *Commission* dealt with the case, as it was required to do by Section 310(b), solely on the basis of the transfer of a going radio station. Its order approving the assignment of license makes this clear. The Commission's consent was expressly

> ". . . based upon the representations made by the assignor and/or assignee . . . that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith" (Petitioners' Brief, p. 61; Ex. 32, R. 661, 662A).

The *respondent* sought and seeks the return to the Society of a going radio station—and nothing less—the license as well as the licensed facilities, and particularly the license. The petition throughout is based upon the fact that Radio Station WOW, comprising license and licensed facilities, was transferred (R. 1-10). Its prayer was that

> ". . . . the aforesaid lease and assignment of license . . . be declared illegal and void and . . . immediately cancelled and terminated . . ." (R. 10).

The *court* below dealt with the case as presenting a contest solely over a going radio station, license included. Its first opinion reveals that it was the fate of that and nothing else which it was deciding (R. 745 *et seq.*). Basic to its decision is the finding of inadequacy of consideration. And it is apparent that that finding necessarily rests for the

most part upon the value inhering in the license—in the federally granted monopolistic privilege to broadcast. As the Government's brief states (p. 16), "The physical property of the station . . . is worth not more than $175,000," but, apart from other very valuable considerations, the Society is to receive "an average net rental of $74,000 per year" (pp. 16-17); "capitalizing this figure produces a value of approximately $1,000,000" (p. 17). This valuation, as the Government points out (p. 17), is plainly

> ". . . attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued."

As it makes clear, this value "would cease with a termination of the license" (p. 17). Thus, the very dominant basis for the judgment below, the finding on inadequacy of consideration, is a going radio operation, of which the license is plainly, by far, the major factor.[3]

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[3] The New York Court of Appeal's analysis, in *People ex rel. Met. St. Ry.* v. *Tax Commrs.*, 174 N.Y. 417, 67 N.E. 69 (1903), of the factors constituting the value of a franchised operation aptly illustrates the extent to which the Nebraska Court must have taken the license into account in finding an inadequacy of consideration (pp. 440-442):

> "The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on, is so intimate as to be inseparable in any practicable system of estimating values. Of what value are poles, strung with wires, standing in the street, without a special franchise to use them to carry electricity or send the mysterious message? What are appliances worth, when made for a special purpose, if they cannot be used for that purpose? What are rails and ties worth, when so fastened to the land in a public highway as to be legally a part of it, without a special franchise to place and use them there as part of a railroad? All the mains and pipes, poles and wires, rails and ties of the relators, when separated from their special franchises, have no value except as firewood or old iron. Their only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As part of the franchise they are worth something, but severed from it nothing to speak of. Suppose a street railroad company should forfeit its special

The court, too, in its judgment leaves no question that it is disposing of a going radio station, with the license included. It ordered that the transfer of both the license and the station properties be "vacated and set aside"; that "the license to operate the station be returned", and that the parties "do all things necessary for that purpose" (R. 745).

In the face of this undeviatingly consistent record that what has been involved throughout in this case is a going radio station and only a going radio station, including its license, the Government takes the position that the judgment below can be saved merely by modifying its form so as to apply only to the licensed facilities. This is comparable to the lower court's afterthought, in its second opinion, that the license was an "incident to the suit only" (R. 798). The whole record recited above negates any such idea. Indeed, just the contrary is the case. This cannot be made into an action to set aside only a lease of physical property. The licensed facilities have never been separately projected as the subject matter of this litigation, or any of the transactions involved in it. To consider them alone in this case

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Cont'd.

franchise by a violation of the grant, what would its rails and ties be worth? They would cease to exist as rails and ties, and would vest in the owner of the fee. The expense of grading, placing them in position and paving around them, which is a large part of the original cost, would cease to be an investment and would be property no longer. They are worth virtually nothing except for railroad purposes and a railroad cannot occupy a street without a special franchise. Separate them from the franchise by taking away the street privilege, and they are destroyed. Their only value as rails and ties, as distinguished from so much old wood and iron, is gone. . . . The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire."

is to create an abstraction. They have never had any part in this case except as embraced in a going radio station and in relation to the license which gives them their value. They are the "incident" in this case. The license has been and remains, whatever the form of the decree, the real subject matter of this litigation. Without the license, there is no lawsuit; without it, the judgment of the court does not even have a rational basis. Only with it, does the judgment bear any reasonable relation to what has gone before. Only by being able to cause the issuance of a license to the Society is the judgment saved from the defect of the utterly arbitrary and capricious action of destroying the whole value of the judgment—of destroying the very thing upon which it itself is based, the license. The fact is, the case is not altered by narrowing the form of the decree.

The licensed facilities, to be sure, are important in this case, *but only in relation to the license which they support, only for the impact which they have upon the license, only as a handle for attempting to accomplish indirectly but equally effectively what cannot be done directly*—to set aside Commission action transferring the license to WOW, Inc. and cause the issuance of a license to the Society. There could be no clearer case of the tail wagging the dog. For, as we have shown (Petitioners' Brief, pp. 30 *set seq.*) and shall briefly repeat here, the effect of the judgment, even if limited to the licensed facilities, is little different from a judgment operating against the license itself. We shall then show that the contentions of the Government's Brief do not support its conclusion that the judgment below, limited to the licensed facilities, may stand.

B. BY TAKING THE LICENSED PROPERTY OUT FROM UNDER THE LICENSE, THE JUDGMENT KILLS THE LICENSE AND ENCROACHES UPON THE COMMISSION'S LICENSING FUNCTIONS

It may be taken as established that the judgment's direction as to the licensed facilities has the necessary effect of killing the license issued by the Commission. The license falls legally dead in two ways: first, under the requirement implicit in the Act (see Petitioners' Brief, pp. 38-39) and

made express by rule of the Commission (Section 3.71),[4] for continuity of operation. *E.g., Hearst Radio, Inc.*, 7 F.C.C. 296 (1939). This regulation has been adhered to to such an extent that the Commission, except for brief emergency interruptions, has refused to permit even the licensee possessing the licensed facilities to continue to hold the license while the station is forced to go off the air because of extremely difficult economic conditions imposed upon small stations at the outbreak of the war. *Astoria Broadcasting Co.* and *Petersburg Newspaper Corp.*, Broadcast Report No. 415, March 9, 1943.

Second, and *a fortiori*, the license is legally dead when the licensed facilities are removed from under the license which they support. A license is not an independent personal right, but an authorization for the operation of certain particularly specified physical and electrical facilities. *E.g., Hearst Radio Inc.*, 7 F.C.C. 292 (1939). If other properties were available—which they are not at this time—the simple fact remains that with the removal of the specific facilities, the license is dead. Even in the event other facilities could be made available, the owner must apply to the Commission for a construction permit and thereafter an entirely new license to authorize operation of the new properties.

This much is recognized by the Government. It agrees that the judgment with respect to the station properties, if permitted to stand, will cause the "loss of the broadcasting license" (Brief of the United States, p. 8).

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[4] Section 3.71 of the Commission's Rules provides:

"Minimum operating schedule.—Except Sundays, the licensee of each standard broadcast station shall maintain a minimum operating schedule of two-thirds of the total hours that it is authorized to operate between 6 a.m. and 6 p.m., local standard time, and two-thirds of the total hours it is authorized to operate between 6 p.m. and midnight, local standard time, except that in an emergency when, due to causes beyond the control of the licensee, it becomes impossible to continue operating, the station may cease operation for a period of not to exceed 10 days, provided that the Commission and the inspector in charge shall be notified in writing immediately after the emergency develops."

The encroachment of this judgment upon the Commission's functions is clear. It is direct and substantial. Here also the Government's brief supports our views.

In the first place, the judgment kills the license and thereby nullifies the very public service operation which the Commission authorized. Moreover, it directly attacks and nullifies the Commission's order approving the transfer of the Station to WOW, Inc. As we have shown (*supra*, p. 7), the Commission's approval of the assignment of license to WOW, Inc. was, as required by Section 310(b), predicated upon the transfer of a going radio station, of the specific facilities covered by the license. Only upon such a transfer was the Commission's consent operative. Accordingly, by removing the licensed properties from under the license, the judgment below sets aside the Commission's order. As a result, the judgment runs counter to Section 402(a) of the Act (Petitioners' Brief, pp. 66 *et seq.*), and, as well, violates established principles for preserving unity of franchise and property which have been subsumed under the Communications Act. (See, *infra*, pp. 22-34.)

In the second place, the judgment weighs heavily upon the Commission's exercise of its licensing functions. By depriving WOW, Inc. of the facilities and putting them in the Society, the Nebraska Court, as we have shown (Petitioners' Brief, pp. 63-64), has in large measure already determined who the licensee shall be. The whole problem in terms of the substantial time and scope of physical, economic and administrative action required in setting up a new station—even if materials were available, which they are not—is such that the party holding the whole facilities is much nearer to recognition as a licensed operator than the former licensee. The compulsion upon the Commission to serve the public interest by preserving the continuity of operation of an important broadcast service is so strong as substantially to affect the administrative choice between the Society and WOW, Inc. In addition, appropriate and approvable sites for radio stations are restricted. And the growth of air commerce substantially restricts the field even

further. Even if WOW, Inc. could find a suitable site, it may be presumed that the present site is the best. Accordingly, the service which an entirely new operation could render is likely to be electrically inferior to that which the Society could offer. This also would be a factor tending to predetermine the Commission's action.

The Government's brief recognizes the substantial interference with Commission action resulting from the judgment with respect to the licensed facilities. The extent to which the issuance of a license hinges upon the possession of the facilities is emphasized by the statement, not once but twice, that the Commission will be faced with "an application for the transfer of the broadcasting license, growing out of . . . the disposition of the physical properties of Radio Station WOW by the judgment in this case" (Brief of United States, pp. 14, 8-9). It is also recognized that the effect of the judgment "may be to shut off broadcasting by the station" (*Ibid*, p. 7) and that, entirely apart from the judgment's compulsion upon the parties to effect the issuance of a license to the Society, WOW, Inc. will be in a position to compete with the Society for the license, only if it "should . . . become equipped to" build a station (*Ibid*, p. 13). The whole of the Government's brief, concerned as it is with preserving continuity of service by keeping the license and licensed facilities together, is eloquent testimony of the influence which the judgment below would have upon Commission action.

To be sure, the Government contends that the Commission's action "with respect to the license will in no wise be *foreclosed* or *governed* by the judgment with regard to the property" (*Ibid*, p. 9).[5] Careful note must be made of the wording used here—*only* that the Commission's action with respect to the license will not be *"foreclosed"* or *"governed"*—not that the Commission's functions will not be "interfered" with or "encroached" upon. In view of the explicit recognition, just noted, elsewhere in the brief of the actual impact of the judgment, this statement can be

[5] All italics herein are supplied, unless otherwise noted.

taken only as a clear acknowledgment that there is substantial interference with the Commission's functions—thus carefully worded because of the necessity of maintaining a superficial consistency with the contention as to the Nebraska Court's jurisdiction. When unencumbered with legal conclusions, the Government's view as to the actual impact of the judgment is clear (Brief, p. 16):

> "Not only may the judgment in this case result in the *public's loss of broadcasting services* by Radio Station WOW for at least a period of time *if the Commission declines to consent to a return of the license to the Woodmen* of the World Society, but the grounds of the judgment as expressed in the court's opinion, *together with the judgment itself, will bear upon the Commission's exercise of the authority committed to it by the Communications Act.*"

It may fairly be taken as unquestioned, therefore, that the judgment with respect to the licensed facilities, if permitted to stand, constitutes a direct and effective attack upon the Commission's order approving the transfer of the station to WOW, Inc. and substantially impairs the free exercise of the Commission's discretion in performing its licensing functions. The Government, nevertheless, contends that the Nebraska Court's judgment with respect to the licensed facilities may stand. We have now, therefore, to consider the reasons advanced by the Government for tolerating *this* substantial and admitted encroachment upon the Commission's functions.

C. THE GOVERNMENT'S CONTENTION THAT THE NEBRASKA COURT HAS JURISDICTION TO GIVE THE JUDGMENT WITH RESPECT TO THE LICENSED FACILITIES WHICH WILL ENCROACH UPON THE COMMISSION'S FUNCTIONS IS, AS IT ITSELF RECOGNIZES, UNSOUND

The contentions advanced by the Government seem to be as follows: Nothing in the Act leads to the conclusion that the State courts may not deal with radio station property and there are several instances in which actions with respect to property may be maintained in the State courts (pp. 5-6); a radio station is just like any other business,

and the acquisition, encumbrance and disposition of property used in broadcasting are subject to the laws which govern business enterprises generally (p. 6); cases refusing to separate property from a franchise to which it is devoted apply to public utilities where continuance of the public service is jeopardized (pp. 6-7); the Act does not require Commission permission to discontinue broadcasting (pp. 7-8); and the Commission has consistently refused to assert authority with respect to the control of radio station property (pp. 9-11).

We shall consider each of these contentions. None has merit as applied to this case.

The Government's whole position is vitiated by two fundamental misconceptions upon which it is obviously based: first, the notion that broadcasting is just like any other business enterprise and, second, the dogmatic and absolute separation of a going radio station's "license" and "property" into two separate worlds.

The first misconception—that broadcasting is like any other business—permeates the Government's discussion in Point I of its brief (pp. 5-11), though there is a curious and ameliorating shift of approach in Point III (pp. 14-21). This misconception prevents a realization of the basic character of this case. To regard broadcasting as no different than any other business is to ignore vital considerations of public interest applicable here. It leads to resorting to the category of "public utility" to seek a distinction from cases preserving the unity of a franchise for public service and property devoted to that service (Brief of United States, p. 6), rather than to a search for the bases upon which that doctrine has been placed and an appraisal of their applicability here. (See, *infra*, pp. 23-27.)

It is, unfortunately, a matter of supererogation to have to show, let alone labor the point, that a broadcasting station is *not* just like any other business. It is sufficiently evident, and we have already shown (Petitioners' Brief, pp. 30-36), that no such view of the character of broadcasting can be supported. Radio broadcasting performs services in

and to the community which necessitate special consideration. It is one of the most important, if not *the* most important means of formulating public opinion and of disseminating news, enlightenment, and entertainment among our people. Broadcasting is an operation which rests upon a large measure of monopoly; it has a public significance of great import; it exerts a potent influence in the Nation upon the successful prosecution of the war and the promotion of the national defense; through its facilities countless millions are reached many times daily by the Government in its appeals, for war bond purchasers, enlistments in the many types of war service, compliance with rationing and price regulations, and the like. Is an operation performing this great public service to be lightly destroyed on the basis that it is just another business? It has, in short, such a distinctive and vital character, as to have formulated for it by the Congress a comprehensive, regulatory scheme in order to serve "public interest, convenience and necessity". It is a business conducted under a public license which confirms its unique character. Factually, on the compass of public interest, the needle is more attracted to this vital field than to any other. Any approach to this problem which does not rest upon these undeniable facts cannot fail to reach an unsound result.

The second misconception involves the wholly unsupportable technique of deciding particular cases by a "jurisprudence of conception". The mechanical division between physical property and intangible license causes the Government to treat as apposite certain other cases involving radio station property (Brief of United States, p. 5), which present entirely different problems from that involved here. It accounts for its anomalous acceptance of admitted, serious, actual encroachments upon Commission jurisdiction. In short, it leads the Government directly to two rigidly parallel and mutually exclusive jurisdictions of State court and Commission and underlies its view that the judgment below may stand provided only the form of the decree is changed. In all this, we submit, the Government ignores the real character of the case. It confuses the real

subject matter, the real purpose and the intended effect of this litigation with the *form* of the judgment. For to make an arbitrary, absolute separation of "property" and "license" here contradicts the whole course of the case and the transactions involved in it (*supra*, pp. 6-10).

Unless we are to blind ourselves to the real problem presented here, we must deal with this case and the issues involved, not on the basis of convenient but oversimplified categories, but on their own merits. We must deal with a going radio station on the basis of its unique status—at the least, on the basis that it is a going radio station and not two abstractions, inert property and intangible license. We must, finally, in the light of established principles and public policy, determine what the appropriate answer is to the problem presented here.

1. THE COMMUNICATIONS ACT NEGATIVES THE JURISDICTION OF THE COURT BELOW TO GIVE THE RELIEF GRANTED IN THIS SUIT

The Government first contends that there is nothing in the Act leading to the conclusion State courts may not deal with radio station property (Brief of United States, p. 5). No authority is cited. Rather some unsupported assertions with respect to other supposititious cases involving station property are advanced (pp. 5-6). Not only, however, do the purposes and provisions of the Act negate the encroachment on Commission functions involved in the judgment below, but the asserted analogies are entirely inapposite to this case.

Basic in the Act is the intent to establish a centralized administrative control, exercised largely through the licensing powers, which cannot be nullified or impaired except as provided in the Act itself. It is the Commission alone which is to choose broadcast licensees in the "public interest, convenience and necessity" (Sections 307-312, 319(a)) in order to ensure the best possible service to the public (Section 301); and participation by other tribunals in the exercise of that function by whatever means or on whatever grounds is clearly excluded (Petitioners' Brief, pp. 33-36). The

judgment below plainly impairs the integrity of that function.

Controlling here is the fact that, over and above the many provisions in the Act based on the interdependence of license and licensed facilities (*supra*, pp. 6-7; Brief, pp. 37-39),[6] the very provision applied in this case (Section 310(b)) applies only to the transfer of a going radio station, to an assignment of license only in conjunction with its supporting, specifically licensed facilities. The Commis-

[6] The license is but the means of carrying out the congressional purpose of providing an "efficient, Nation-wide . . . radio communication service with adequate facilities" (Sec. 151). " 'Radio communication' . . . means the transmission by radio of . . . signals . . . and sounds of all kinds, including all instrumentalities, facilities, apparatus . . . incidental to such transmission" (Sec. 153(b)). Since the Act is to apply "to the licensing and regulating of . . . radio stations" (Sec. 152(a)), and a "radio station . . . means a station equipped to engage in radio communication" (Sec. 153(k)), "No person shall use or operate any apparatus for the transmission of energy or communications . . . by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter" (Sec. 301). "[The] Commission . . . as public convenience, interest, or necessity requires, shall . . . (d) Determine the location of classes of stations or individual stations" (Sec. 303(d)). Throughout the Act, it is the licensing of a "radio station" and a "station license" which is provided for, Secs. 152(a), 303-305, 307, 309-312, 318, 326. It is a *"station* license" which is granted (Sec. 307(a), (e)), and it is always "granted for the operation of a broadcasting station" (Sec. 307(d)). A radio station under the Act may not be secured, granted or held except that it is applicable to certain specific physical equipment useful in radio communication. To recognize any license as being independent of specific facilities would violate "the purpose of this chapter . . . to provide for the *use* of such channels, but not the *ownership* thereof" (Sec. 301). The *"ownership* and location of the proposed station" (Sec. 308(b)) for which a license is sought are factors in the Commission's finding of "public convenience, interest, or necessity" (Sec. 307(a)). Each license states that: "Neither the license *nor the right granted thereunder* shall be assigned or otherwise transferred in violation of this chapter (Sec. 309(b)(2)), and Sec. 310(b) elaborates: "The station license required hereby, the frequencies authorized to be used by the licensee, *and the rights therein granted* shall not be transferred, assigned, *or in any manner* either voluntarily *or involuntarily* disposed of . . . to any person, unless the Commission shall, *after securing full information,* decide that said transfer is *in the public interest* and shall give its consent in writing." "The actual operaton of all transmitting apparatus in any radio station . . . shall be carried on only by a per-

sion's order approving the transfer under this Section (Ex. 32, R. 662A), and making explicit what is implicit in the statute itself, specifically rested upon the transfer of a going radio station, licensed facilities included, to WOW, Inc. As, we wish to emphasize, this case throughout has concerned a going radio station—at no stage the property alone—the court below cannot, by seizing hold of this necessary part of the Commission's action, be permitted to interpose itself into and set aside the very transaction passed upon and approved by the Commission in such a way as to kill the license issued by the Commission and to impair the Commission's freedom and ability to deal with the confused and anomalous situation thus thrust upon it. See *Hyer* v. *Richmond Traction Co.*, 168 U.S. 471, discussed *infra*, pp. 32-33).

Moreover, the judgment below nullifies the Commission's order contrary to Section 402(a). Even if limited to the licensed facilities, it acts directly against and sets aside the transfer of license to WOW, Inc. The result is the same as if the court framed its decree to enjoin WOW, Inc. from exercising its rights under the license issued by the Commission. *E.g. Venner* v. *Michigan Central R.R.*, 271 U.S. 127; *Village of Mantorville* v. *Chicago Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934).

Central New England Ry. v. *Boston & Albany R.R.*, 279 U.S. 415, and *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, do not, as contended by the Government (Brief, p. 7), "by a parity of reasoning" make clear "that the [State] courts have jurisdiction with reference to the

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Cont'd.

son holding an operator's license issued" by the Commission (Sec. 318), and constant Commission inspection of "all radio installations associated with stations required to be licensed" is authorized (Sec. 303(n)). The interdependence of "station license" and "radio station" and "facilities" is, thus, repeatedly made clear. So intimate is the relation of license to facilities that a construction permit for the latter (minutely regulating the ownership, construction, and proposed operation of the station) is required as condition precedent to securing the former (Sec. 319). The statutory amalgamation of facilities to license is clear. It renders futile the attempt to talk about one as though it were unrelated to the other.

physical property of radio stations notwithstanding the licenses issued by the Commission."

The *Central New England* case raised the issue of whether or not an order of the Interstate Commerce Commission, authorizing abandonment of a branch line of defendant railroad, relieved defendant from his duties to pay rentals under a lease contract covering another line with plaintiff's assignor. The matter of the lease had not been presented to or passed upon by the Commission. The Court there held only that an action for damages could be maintained in the State court. It recognized, indeed, that an action cannot be maintained where relief is sought (p. 420):

> ". . . either that the order be set aside or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be performed."

Such relief, it was acknowledged (p. 421), "would operate practically to set aside the order of the Commission."

While the Government also cites *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, for the proposition that a regulatory order would not deprive the courts of jurisdiction with reference to property and obligations which the order may incidentally affect but which were not before the agency for consideration, the case is not pertinent. In that case this Court sustained the order of the Commerce Commission which was attacked directly by a proceeding in the federal court under the Urgent Deficiencies Act. In sustaining the plenary powers of the Interstate Commerce Commission, the Court explicitly laid aside any such questions as are indicated by the statement in the Government brief. If, however, the Court had made such a holding, it would not be applicable to the case at bar. There is no question here of "the right of a State of incorporation, in a direct proceeding, to challenge the lease as *ultra vires*." 287 U.S. at 26. If questions of "incidental" effect were involved here, we would never have

been before this Court. In this case the attack is directly and exclusively on the transaction authorized by the Communications Commission.

Both the *New York Central* case and the *Pittsburgh & West Va. Ry. v. United States*, 281 U.S. 479 (discussed in our brief, pp. 68-75) are to be distinguished upon an additional ground. In neither of them did the plaintiff's case hinge upon the action of the Commission. The causes of action existed independently of the Commission order; the contrary is true in the instant case. Here, over and above the fact that the Commission's order was a prerequisite to the consummation of the transfer complained of, respondent's whole cause of action is founded upon the license and upon its transfer from the Society to WOW Inc. pursuant to Commission order. Without that transfer of the license, plaintiff has no complaint. Indeed, the essential basis for the judgment, i.e., inadequacy of consideration, rests squarely upon the license. The Commission's order is the central operative factor of the alleged injury sought to be remedied by the Nebraska Court. The point may be emphasized by the question: Assuming this case were sent back for reconsideration in the Nebraska Court as if only inert physical property were involved, can it be contended that plaintiff could make out a case? The question answers itself. Not only does plaintiff not want the inert physical property, but any possible claim of merit would vanish in thin air if the case were to be decided on the basis of a license-less physical structure.

The analogies cited (Brief of United States, pp. 5-6) to support the conclusion that there is nothing in the Act to indicate that State courts may not deal with radio station property show how unsound that conclusion is as applied to this case. For the instances cited are entirely inapposite to the case presented here. For example, in the mortgage and ejectment cases, the plaintiff is seeking land and only land. The license is only incidentally and collaterally affected. The plaintiff does not set out to acquire a broadcast station. The contrary is the case here, however. Here the property has never been the sole or even the

major subject matter of the litigation. That has been and remains the license. The land is significant only because of its impact upon the license. Here it is the property which is the incident in the suit; in those cases, it is the license. Moreover, there the plaintiff does not attack the very transaction passed upon by the Commission; he has no opportunity to present his case to the Commission. Here, however, the plaintiff, seeking to by-pass the Commission, is directly attacking the Commission's order, and the result is not changed by limiting the judgment to a factor essential to Commission action and dispositive of the whole case. We do not believe that in the supposititious cases this Court would not insist upon safeguarding the public interest. Suffice it to say that each of the foregoing factors disinguishes the cited examples from the case actually involved here.

2. THE COMMUNICATIONS ACT IS TO BE INTERPRETED IN THE LIGHT OF THE ESTABLISHED PRINCIPLE THAT COURTS WILL NOT REDRESS PRIVATE WRONGS BY REMEDIES DETRIMENTAL TO PUBLIC INTEREST

As a guiding principle in considering a very recent form of public service and as supporting evidence that the Nebraska Court's judgment here interferes with the realization of federal public policy with regard to radio broadcasting embraced in the Communications Act, we stated in our brief (pp. 72-73; see also p. 37), the well-established principle "that courts, in suits to enforce private remedies, will deny relief which will prejudice the public interest" (p. 72).

As illustrative of this principle, we referred, first, to cases holding "that property devoted to a public service will not be separated from the franchise it is necessary to effectuate, . . . [that] rights asserted against that property are subordinated to that principle in order to protect the public interest" (Brief, p. 37); second, to cases where some consideration of the public welfare or concern for an unimpaired public service led to denial of remedies, otherwise proper, which would disturb that public interest (Brief, pp. 72-73).

The Government has referred only to the first group of cases and, in restating them, appears to argue that they are inapplicable here because they involved "public utilities" (Brief, of United States, p. 6). No authority is cited for this view, and an analysis of the cases themselves (as well as of the others not discussed by the Government, *infra*, pp. 29-32) will demonstrate that the foundation of the principle protecting certain activities important to the public rests on considerations wholly applicable to radio broadcasting. In none does the protective principle depend on any conceptualistic categorization of "public utility". The cases themselves do not swing on this technical pivot.

Although the *kinds* of enterprises represented in the first group of cases differed one from another (railroads—canals—water companies—ferries, etc.) they rest upon these common factors: (a) a public franchise or license; (b) some degree of monopoly; (c) a public interest in continuity; nor do all of the cases involve a "public utility".

In each case, "the public character of the service," *Ackroyd* v. *Winston Bros. Co.*, 113 F.(2d) 657, 663 (C.C.A. 9th, 1940), meant that "the public . . . [was] directly interested in the results to be produced", *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 31 (1868). Public interest "in the results" implied public interest in uninterrupted service. At the same time, the nature of the service was such that it had to be restricted to a few. Only by restricting the number and by approving each operator could the desired service be obtained. The means adopted was the franchise. It represented the community's decision as to who should perform the public service in which it was so keenly interested. Since "the privileges conferred . . . [were] conferred with a view to the use and accommodation of the public", *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 860, 51 N.W. 240 (1892), certain immunities—inapplicable to ordinary enterprises—were considered necessary. Allowing the facilities necessary to the effectuation of the public service, that is, of the franchise, to be taken away, whatever the means of doing so, except under a procedure which also provided for the transfer of the franchise, would mean

the frustration of the public interest or would compel the public to submit to performance of the service by one who had not been previously approved. But common sense dictated that the public's interest in and protection of the fruitfulness of the franchise be extended to the properties devoted to realization of the franchise. Regarded practically, the franchised operation was an intimate unity of franchise and facilities. As the New York Court of Appeals said, in *People ex rel. Met. St. Ry. Co.* v. *Tax Commrs.*, 174 N.Y. 417, 441-442, 67 N.E. 69 (1903):

> "Their only substantial value is the right to use them in connection with the franchise, and hence they are incidental to the franchise . . . the value of either resides in the union of both. . . . We regard the tangible property as an inseparable part of the special franchises . . . constituting with them a new entity, which, as a going concern can neither be assessed nor sold to advantage except as one thing, single and entire."

Likewise in *Hammock* v. *Farmer's Loan & Trust Co.*, 105 U.S. 77, 89, this Court, holding an Illinois statute regarding a right of redemption inapplicable to railroad properties separated from the franchise, said:

> ". . . a sale of the real estate, franchises, and personal property, separately, might, in every case, prove disastrous to all concerned, and defeat the ends for which the corporation was created, with authority to establish and maintain a public highway. . . . Thus, one person might become the purchaser of the real estate, another of the franchise, and still others of the personal property. If the railroad company should redeem the real estate, it could not employ it to any valuable end; for its franchise, to be a corporation and to use its real estate for railroad purposes, will have been sold to another, and there is no right under the statute to redeem the franchise, it not being real estate, but, rather a power or privilege, partaking more or less of sovereignty, and which may not be exercised without a special grant."

Plausible implications stemming from a possible analytical distinction between "franchise" and "property" were, therefore, not allowed to obscure the fundamental fact that it was the unity of the two which constituted the real worth of either, whether to the franchise holder, to his creditors, or to the public. Separation was not allowed, and those seeking to enforce merely private rights against the enterprise were shunted to remedies which would not cripple its continued existence.

Thus, in *Gue* v. *Tide Water Canal Co.*, 24 How. 257, a judgment creditor of a joint stock company franchised to operate a canal was seeking execution by sale against various properties necessary for the uses and working of the canal. This Court enjoined sale of the facilities because it would separate the properties from the franchise, whereas the value of the enterprise, to other creditors and to the public, inhered in their unity.

> "Neither can the lands or works essential to the enjoyment of the franchise be separated from it and sold under a fi. fa., so as to destroy or impair the value of the franchise." (Syllabus) 24 How. at 257.
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> . . . . . .
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> "The property . . . is of itself of scarcely any value apart from the franchise . . . [if] sold . . . without the franchise, would bring scarcely anything; but would . . . render . . . [the] franchise . . . utterly worthless." 24 How. at 263.

There was no mention of the variety of factors associated with the concept of "public utility" as it is understood today. This concept now involves a variety of considerations clearly absent and distinct from the reasoning underlying the *Gue* case and the others applying the same principle. In the *Gue* case, this Court was merely protecting the interest of both the corporation and of the public in the continued ability of the canal to operate. It realistically looked to the imperative need of keeping the franchise and property together. (See the discussion of the *Gue* case in *Hammock* v. *Farmer's Loan & Trust Co.*, 105 U.S. 77, 90.)

In *Ackroyd* v. *Winston Bros. Co.*, 113 F.(2d) 657 (C.C.A. 9th, 1940), a judgment lien for work done was sought to be executed against property of a reservoir company furnishing water to landowners in an irrigation district. The reservoir district owned a majority of the stock of the reservoir company. The reservoir company was a privately-owned, cooperative enterprise. It supplied water only to its stockholders and in proportion to the amount of shares which they owned. It was clearly not a "public utility." Execution was disallowed, not on grounds of the substantial public ownership or on any attempted "public utility" classification, but on the fact that the company was rendering an important service to the community. The importance of the service created a public interest in its continuance. Recognition of the interest forbade separation of franchise from property.

The same reasoning accounts for *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868); *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig. W.P.& I.Co.* v. *Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Brady* v. *Johnson*, 75 Md. 445, 449, 26 Atl. 49 (1892); and *Northern Pac. R.R.* v. *Shimwell*, 6 Mont. 161, 9 Pac. 889 (1886). See also *Re Boston, Revere Beach & Lynn R.R.*, 31 P.U.R. (N.S.) 257 (Mass. Dept. of Public Utilities, 1939), cited in the Government's brief (p. 7). The Nebraska Supreme Court held in the *Overton Bridge Company* case, *supra*, that property of a toll bridge

> "... which is essential to the exercise of its franchise and the discharge of the duties it has assumed toward the general public, cannot, in the absence of statutory authority, be seized and sold to satisfy an ordinary judgment...." (Syllabus) 33 Neb. at 857.

In cases where other remedies were inadequate, sequestration of income might be allowed until the claims were satisfied, but the drastic killing of the franchise was steadily refused. See *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 31 (1868).

The very same factors underlying the cases just discussed are present here. The principle requires only a frank recognition of the social function of radio broadcasting and the importance of the continuous character of its service to the public. (See *supra*, pp. 15-16.) It is a franchised operation; and the limited number of franchise holders are selected and authorized by the single public agency. The Commission determines who the franchise holder (the licensee) is to be; it does so only with reference to specific facilities; and it is the agency called upon to consider and evaluate any transfer of the licensed operation to another. Here, as there, the value of the property is derived largely from the franchise, and without the property, the public service is destroyed. It is with this public service and this clear administrative function that the judgment of the Nebraska Court constitutes an illegal interference.

The existence of a legally enforcible duty to continue operations is immaterial to the application of the principle. We do, however, disagree with the Government's construction (Brief, p. 8) of Rule 3.71[7] of the Commission. That Rule requires a licensee to continue operations for the term specified in his license. Violation thereof subjects him to the penalties of Sections 502 and 401(a) of the Act. The Government also passes lightly over the point that in ceasing operation—even while holding the properties—the licensee suffers the loss of the franchise. It is difficult to imagine a more severe loss to the party or to the public. Moreover, the application for a license, and the grant thereof by the Commission, do create an administratively confirmed expectancy, stemming from the Act, that he will continue. This expectancy is clearly revealed in the detailed investigation required by the Act into the legal, technical, financial, and other qualifications of every proposed licensee and of the designation and engineering analysis required of the equipment specified as the proposed radio broadcasting facilities (Section 308(b)). And the stipulation required by Section 319(b) to be a part of every construction permit (that the permittee show spe-

[7] See, *supra*, fn. 4, p. 11.

cifically the earliest and the latest dates between which actual operation is to begin) indicates the extent to which the granting of a license creates and is based upon this expectancy. The entire environment is one of mutual commitment: The Commission, on behalf of the public, commits the frequency and authorizes its use; the licensee makes assurances that he is ready, able, and willing to serve the public for the period of the license and any renewal thereof. If he fails, the penalty is automatic. It must be remembered, moreover, that the principle is based not on the protection of the station, but on protection of the public. As Mr. Justice Holmes said in *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 498, "the very meaning of public policy is the interest of others than the parties." On these grounds the protective principle is applicable. The acknowledged importance of the service, we repeat, creates an interest in the public in the continuance of the radio broadcasting operation—which is really an interest in the vitality of the broadcasting license. Without that vitality, which has been entrusted to the protection of the Commission, the "avowed aim of the Communications Act of 1934 . . . to secure the maximum benefits of radio to all the people of the United States" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217) cannot be realized.

Indeed, the cases cited by the Government (Brief, pp. 4-7) serve only to confirm and elaborate upon the principle we believe applicable here, or apply to situations not before us. Thus, that liens may be enforced "as respects utility property," "if the public service is not thereby endangered" (Brief, p. 6, citing *Missouri-Kansas-T.R.R.* v. *Mars*, 278 U.S. 258; *Davis* v. *Cleveland, C.C.& St. L.Ry.*, 217 U.S. 157; *Atchinson, T.& S.F.Ry.* v. *Wells*, 265 U.S. 101) is but the converse application of the principle governing here. We differ only in that we refer the principle to the basic considerations which brought it into being—and which exist in the instant case—rather than to the "public utility" categorization which the Government now chooses to apply to the *kinds* of enterprises represented by some of the cases cited. It is the public character of the service

rendered and the public's interest in controlling and continuing it which created the peculiar immunities.

Thus, in the *Davis* case (in disposing of the contention of the railway company that "to permit the instrumentalities used in the interchange of traffic by railway common carriers to be seized on process from various state courts does directly burden and impede interstate traffic within the inhibitions of the Act of Congress"), this Court said (p. 176):

> "This can only result if there is incompatibility between the obligations a railroad may have to its creditors and the obligations which it may have to the public, either from the nature of its service or under the Acts of Congress."

The other cases cited by the United States (pp. 6-7) give no reason why radio broadcasting should not be held within the protective principle of the other franchise cases. *International Milling Co.* v. *Columbia Transportation Co.*, 292 U.S. 511, involving the question of an unreasonable burden on interstate commerce and *Chicago, R. I. & Gulf Ry.* v. *Tarrant County W.C.& I. Dist.* (Tex. Civ. App.), 76 S.W. (2d) 147 (1934), cert. den. 295 U.S. 762, resting upon the exercise of a State's power of eminent domain (see *Hudson River R. R. Dist.* v. *Fonda J.& S.R.R.*, 249 N.Y. 445, 454-456, 104 N.E. 541 (1928)), plainly have no application here.

In attempting to render the franchise cases just discussed inapplicable here—by assuming that *categories* rather than *principles* are controlling—the Government completely ignores the other cases we had cited (Brief, p. 72), which support the interpretation for which we are contending. Both kinds of cases stand for the fundamental principle that the public's interest in the continuance of an important service, or in some consideration of public welfare, will be protected against those remedies enforcing merely private rights which threaten it.

Elliott Nursery Co. v. *Duquesne Light Co.*, 281 Pa. 166, 126 Atl. 345 (1924) (cited in our brief, p. 72) shows the

controlling considerations. That was a suit to enjoin the depositing of excessive and harmful ashes, cinders, soot, etc. on plaintiff's nursery by defendant's adjacent electric power plant. The court refused to grant the injunction and restricted the plaintiff's remedy to money damages because of the great importance to the entire community of the defendant's activity. It said (pp. 176-177):

> "We do not deem it important to discuss the questions which might grow out of the circumstance that defendant is a public service corporation and possesses certain powers of eminent domain. . . . We plant our conclusion on the broader general ground . . . that it would not be the part of wisdom . . . to enjoin the depositing of the substances . . . that the injury which would result from such action . . . would be incalculably greater than that which will happen from refusing it. . . ."

See, further, *Madison* v. *Ducktown Sulphur, Copper & Iron Co.*, 113 Tenn. 331, 366-367, 83 S.W. 658 (1904). Would it not seem "the part of wisdom" here to require that the public interests in radio broadcasting entrusted by the Communications Act to the Federal Communications Commission, and represented here by the continuing vitality of the license to WOW, Inc. be protected from the crippling effect of the lower court's judgment?

In *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492 (cited in our brief, p. 72) the plaintiff sued to enjoin construction of a depot contrary to a contract (entered into by defendant's assignor to acquire land for the railroad from the plaintiff) not to build "any other depot along the line of said railroad within three miles north or south of the one stipulated for." On appeal, this Court denied the injunction. Mr. Justice Holmes said (p. 497):

> "Whether a railroad station shall be built in a certain place is a question involving public interests. Assuming that a contract like the present is valid as a contract, and making the more debatable assumption that the burden of the contract passed to a

> purchaser with notice, it does not follow that such a contract will be specifically enforced. Illegality apart, a man may make himself answerable in damages for the happening or not happening of the event he likes. But he cannot secure to his contractor the help of the court to bring that event to pass, unless it is in accordance with policy to grant that help. To compel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand."

Mr. Justice Holmes then observed (p. 498) that it was admitted in argument the state railroad commission "had ordered the erection of the station in dispute," and that an injunction would create a serious conflict. He continued (p. 498):

> ". . . if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result, whatever the pleadings."

The denial of specific relief in these cases clearly did not rest on any "public utility" theory. It was founded solely upon protecting the "paramount interests" of the public in the railroad's ability to render public service. A remedy, enforcing a private right, which deleteriously affected those "paramount interests", was not to be tolerated.

So also, in the instant case, "paramount interests" are involved. Here also, the remedy sought in enforcement of the private right will gravely disturb the public service in question. In fact, the remedy sought here—tearing the property from the license—will utterly destroy the public service being rendered. See, further, *Texas & Pac. Ry* v. *Marshall*, 136 U.S. 393; *Hoard* v. *Chesapeake & Ohio Ry.*,

123 U.S. 222; *Armour & Co.* v. *Dallas*, 255 U.S. 280; *Seaboard Air Line Ry.* v. *Atlanta B.& C.R.R.*, 35 F.(2d) 609 (C.C.A. 5th, 1929); *Conger* v. *New York West Shore & Buffalo R.R.*, 120 N.Y. 29, 23 N.E. 983 (1890).

That the principle preventing relief prejudicial to public interest is not restricted to "public utilities", as the Government assumes, is further and strikingly illustrated by *Rockhill Tennis Club* v. *Volker*, 331 Mo. 947, 969 *et seq.*, 56 S.W. (2d) 9 (1932). There, plaintiff sued for specific performance of a contract to sell land which defendants, trustees of an estate, refused to perform on the ground that they planned to use the land as a part of an art gallery project. The court refused relief and restricted plaintiff to money damages on the ground that the projected art gallery would be of great benefit to the public. In that case, certainly, no "public utility" was involved. Plainly, the public interest there involved was of far less importance than the interests involved here, and yet the protective principles we have been discussing were applied. See also *Wheeler et al* v. *Standard Oil Co. of N.Y.*, 263 N.Y. 34, 188 N.E. 148 (1933); and see *Ackroyd* v. *Winston Bros. Co.*, 113 F. (2d) 657 (C.C.A. 9th, 1940).

Hyer v. *Richmond Traction Co.*, 168 U.S. 471, discloses how the various doctrines and interests we have been discussing should be applied and balanced. In that case, the plaintiff had agreed with the stockholders of the defendant to seek a city ordinance granting the two jointly the franchise to build and operate a street railway in Richmond, Virginia. While plaintiff was ill and out of town, the defendants appeared before the city officials and secured the franchise for themselves, counter to their agreement. The city officials knew of the agreement but for some reason granted the franchise to the defendants (as a corporation) exclusively. When plaintiff learned of the fraud, he sued to be decreed half-owner in the franchise, property, and stock of the defendant corporation. This Court, however, dismissed plaintiff's bill and restricted his remedy to an action at law for damages. The Court said (pp. 480-482):

"According to the allegations, the city counsel was aware of the two parties, of their agreement to unite in one application, of all the facts surrounding the agreement and proposed union, and with such knowledge it granted this public franchise to one party alone. In the exercise of its judgment in respect to the public interests, the city council determined that it was better that the defendants should have this franchise than that the united parties should have it. In the face of this determination by the authorities having special charge of the public interests, and ignorant as we must be of the reasons which controlled the city council in making this award to the one singly rather than to the two jointly, it would be improper for a court of equity to compel a consolidation of those interests . . . . The city holds its grantee responsible for the proper discharge of the duties imposed by its grant of the franchise. It may well have determined that it did not desire the plaintiff to have any interest in it, or anything to do with the management of the street railway, and that the best interests of the city would be subserved by committing it, primarily at least, to the defendants alone. Shall the courts say that such determination was erroneous, or may be overruled simply because of a private contract between two parties?

. . . . .

"This conclusion, while not interfering with the right of the plaintiff to maintain his action at law for the damages resulting from the defendants' breach of contract, at the same time preserves the city's control over the franchise, and upholds its determination as to the party or parties to whom it is willing to intrust such franchises."

So, too, in the instant case, the Commission, the sole proper selector of the franchise-holder, has granted a license to petitioners, WOW, Inc. It knew that an action was pending in the Nebraska courts, yet it proceeded to approve. That decision involved the commitment of a public domain of the greatest importance—the frequency. It created a public interest in the continuance of the *use* of that public domain *by the particular* party it had investigated and approved. The license represents, therefore, not merely a

permission to use a given frequency. It also involves an interest in the *use* of the frequency and that, *by the party selected.* The action of the Nebraska Court here threatens to destroy the *use* by the *approved* party. To that extent, it disposes of the license, whatever it says to the contrary. To that extent, its action is like the interference which was refused in the *Hyer* case. And in view of the provisions of the Communications Act relating to Commission approval of license transfers, such interference is *a fortiori* intolerable.

3. CASES SHOWING COMMISSION HAS NOT ACTED WHERE ONLY PROPERTY IS INVOLVED HAVE NO APPLICATION HERE WHERE BOTH LICENSE AND PROPERTIES ARE COMBINED IN A GOING RADIO STATION

Finally, in support of its contention that the interference with Commission functions resulting from the judgment below with respect to the licensed facilities is to be tolerated, the Government states that the Commission has consistently declined to assert authority with respect to the control of radio station property. The cases cited (pp. 9-11) obviously do not support the broad application which the statement is apparently intended to have. For, they are inapplicable to the issue involved in this case. Thus, in the *M. A. Leese* case (5 F.C.C. 364 (1938)) (Brief of United States, p. 9) there was involved only the transfer of shares of the *lessor* corporation. It did not hold a license. There was no transfer of the license involved. No transfer of facilities was involved. It has no pertinence to the instant case where the Commission, pursuant to the Act, approved the transfer of a license and its associated properties as a unit, and a State court purports to nullify that action, impair continuity of service, and interfere with licensing activities of the Commission by grabbing the handle afforded by the licensed facilities. The similar lack of pertinency of the cases of *Buffalo Broadcasting Corp.*, 9 F.C.C. 31 (1941), and of *WMCA, Inc.*, decided November 16, 1943, has already been shown in our brief (pp. 69-70, note 29). The other cases cited by the Government (Brief, p. 11) (*Hearst Radio, Inc.*, 7 F.C.C. 292, 295 (1939) and *City of Atlantic*

City, 7 F.C.C. 485 (1939) serve merely to show that the Commission has no concern over the transfer of property where it does not affect a license; in both cases the party was selling properties alone. There was no associated transfer of the license. Properties alone, and properties associated with a license, as here, present entirely different cases. Here the license and associated properties were transferred with Commission approval as a unit and it is that approval that is being nullified.

4. THE GOVERNMENT RECOGNIZES ITS CONTENTION THAT THE COURT BELOW MAY RIP THE LICENSED FACILITIES OUT FROM UNDER THE LICENSE IN THIS CASE IS UNSOUND BY SUGGESTING A "PRACTICAL ADJUSTMENT" WHICH, HOWEVER, IS NOT A SOLUTION FOR THIS OR FUTURE CASES

Not only do the reasons advanced by the Government fail to sustain its contention that the court below may rip the licensed facilities out from under the license in this case, but the Government itself, once it gets free of categories and abstractions and deals with facts, reveals the unsoundness of its own position.

This is implicit in the Government's objection—properly taken—that the direction compelling the parties to effect the issuance of a license to the Society both disables the parties from making a full presentation to the Commission and circumscribes the Commission's ability to obtain "full information" as required by the Act. Much more serious, however, are the limitations imposed upon the Commission by ripping the station properties out from under the license, since the parties could be made entirely free to participate in any proceedings before the Commission as to whom should be granted the new license—but all to no avail, if only the Society has the properties: The freedom of WOW, Inc. is the freedom of the completely paralyzed cripple to walk; the ability of the Commission to make an unfettered choice is also illusory. The basic defect of both is the assumption of power specifically to upset what the Commission has done so as to give rise to a situation where the parties and the Commission are hamstrung.

In Point III of the Government's brief (pp. 14 *et seq.*), it is frankly recognized, however diplomatically, that pro-

tection of both the public interest and the integrity of the Commission's functions requires preventing the property from being ripped out from under the license. It recognizes that whereas the license is, by far, the major element of a radio station (Brief, p. 15), still the properties in this case serve as the fulcrum upon which the license turns (Brief, pp. 14, 8). And the impact of the judgment below is adequately, though somewhat inarticulately, shown by the Government's plea for "an accommodation between the necessitities of adjudication and the requirements of *preserving a statutory administrative authority*" (p. 15); by its recognition that "the action of the court in this case has a *significant practical bearing upon the Commission's attainment of its statutory purposes*" (p. 16); by the statement "Not only may the judgment in this case result in the public's loss of broadcasting services . . . but . . . the *judgment . . . will bear upon the Commission's exercise of the authority committed to it by the Communications Act*" (p. 16); and finally by urging that "the physical property and the broadcasting license . . . be kept together" so that "the *interest* of all parties and *of the public be preserved*" (p. 21). In plain language, these mean that the judgment below as to the licensed properties interferes with the functions of the Commission.

Apparently conscious of the jeopardy to the public interest and the interference with the Commission's functions which would be imposed by the dogma recited in Point I of its brief (pp. 5 *et seq.*), the Government seeks a way out of its self-created dilemma by resort to a strategical "practical adjustment".

This solution is no solution at all. In the first place, even if the procedure were obligatory upon the Nebraska Court, the seeds of conflict, confusion and diverse administration are nurtured and permitted to flourish. The Government admits that the Nebraska Court "had no power to order a return of the federal broadcasting license or to direct the parties with reference thereto" (Brief, p. 12), to enter a judgment "preventing the petitioner Radio Station WOW, Inc. from opposing a return of the license" or

"from applying for a new license to operate a radio station in Omaha," or requiring "the Society to come before the Commission and apply for authority to operate a broadcasting station, if the Society, as this record indicates may be the case (R. 14-16, 287, 316), desires to confine its activities to the life insurance business" (Brief, p. 13). The Government argues, nevertheless, that the court below may "attempt to create a situation" through the officers of the Society to compel the disposition of the license (Brief, p. 14). And the record, in view of the repeated unsuccessful attempts of the Society to sell the station (R. 287, *et seq.*), admits of no conclusion except that the disposition, if any there is, must be back to the Society itself which does not want it and which has decided it is not in its best interests to have. In this case, the "practical adjustment" resulting from the "situation", therefore, means achieving the same result as the judgment which is admittedly invalid. Or, if the Society does not apply for the license, there is no adjustment at all, "practical" or otherwise. There can, in fact, be none, unless the parties are forced to do the very thing which the Nebraska Court attempted to order and which the Government concedes it does not have jurisdiction to order.

Underlying all the projected involvements whereby the State court or the parties turn up a new applicant for a license or some new operation other than that approved by the Commission, is the simple basic premise that the State court may kill the Commission's license and nullify administrative action taken in the public interest. The State court is still permitted, in a substantial and highly objectionable manner, to interpose itself into, interfere with, and participate in the Commission's licensing functions.

In the second place, the procedures are not obligatory upon the State court, as the Government concedes (Brief, p. 19). Thus, the imposition of the very restraints and interferences with the Commission's functions which the Government deprecates, is left to the discretion of the State court. It needs repeating that the question involved in this proceeding is a jurisdictional one. The Court below has

encroached upon the Commission's functions or it has not. It has jurisdiction to grant the present relief or it has not. With all deference we submit that however diplomatic it may be to suggest some procedures to permit the State court to do what is beyond its power—what, indeed, the Government itself obviously, though with some circumlocution, regards as an impairment of the Commission's functions—in a manner which might minimize the offense to the federal jurisdiction, the result is patently unsound.

D. A PROPER BALANCING OF INTERESTS HERE DICTATES THE RESPONDENT BE LIMITED TO AN ACTION AT LAW

The Government states, and we agree, that this case calls "for an accommodation between the necessities of adjudication and the requirements of preserving a statutory administrative authority" (Brief, p. 15). That accommodation can best be achieved by refusing to permit the State court to give the relief projected here against the licensed facilities which can only result in detriment to the public interest and impairment of the Commission's functions. Quite apart from the relief provided by the Communications Act, damages could have been sought in the State courts. That is an established, simple and appropriate means for accommodating public and private interests. (See cases cited *supra*, pp. 30-32.) As this Court said, in *Texas & Pac. Ry.* v. *Marshall*, 136 U.S. 393, 405:

> ". . . it is much more consonant to justice that the injury suffered by the City should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand."

It is especially appropriate where, as here, the judgment arbitrarily and capriciously destroys the very foundation on which it is based: the license—and with it, the worth of the facilities and the public service founded thereon. It also, in this case, serves best to accommodate both judicial and administrative authority and state and national jurisdiction. *Cf. Central New England Ry.* v. *Boston & A.R.R.*, 279 U. S. 415; *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934).

III

THE JUDGMENT BELOW IS BEYOND THE JURISDICTION OF THE NEBRASKA COURT SINCE THE FINDING OF INADEQUACY OF CONSIDERATION, AN ESSENTIAL BASIS FOR THE JUDGMENT, INVOLVES THE DECISION OF MATTERS NOT WITHIN ITS JURISDICTION TO DETERMINE

A further reason for reversal is in the *grounds* for the judgment. We have pointed out in our main brief that the court below relied upon the decision of several questions, determination of any one of which invalidates the judgment resting thereon (pp. 40-60; 75-78). We shall here, in view of the Government's brief, discuss only the Nebraska Court's conclusion, essential to its decision, that the consideration was inadequate. There the court below necessarily relied upon the determination of matters beyond its jurisdiction to determine.

It warrants repetition that this case has throughout been dealt with on all sides as presenting a contest over a going radio station, the very essence of which is the federally granted license. The finding of inadequacy of consideration, in particular, upon which the court primarily relied rests for the most part upon the value inhering in the license itself.

Narrowing the form of the decree, therefore, as the Government suggests, ignores the real character of the suit and the real basis for the judgment. This would be treating the case as one to set aside a lease of physical property alone—as one where the court was concerned only with a transaction involving physical property. And that case has never been presented or litigated. Although, as the Government aptly points out (Brief, p. 16), it is the "physical property of the station, over which *alone* the court claims jurisdiction", it nevertheless relies upon the license, over which it admittedly has no jurisdiction, to undo the transaction approved by the Commission. The court below has determined the validity of the transfer of a going radio station, not just of a transfer of property. And any effort to reframe the judgment so as to appear to apply only to tangible property is artificially to change the char-

acter of the entire case and at the same time to permit the determination of the validity of the transfer of the license. Could the result below have been reached if the court had acted, as it purported, only upon the physical properties?

The attempt of the court below to argue that it acts only upon what is within its jurisdiction, even though its act directly and necessarily disposes of the license, is not unlike the attempt of some States to circumvent their inability to tax property beyond their jurisdiction by framing a formula of tax computation which *apparently* seeks to reach only tax subjects within the taxing jurisdiction, but whose effect is far broader. This Court has consistently refused to give effect to the verbalistic shadows of such attempts. If the substance of the tax, as administered, results in the subjugation of property without the State to taxation, the tax will be invalidated. *E.g., International Paper Co.* v. *Massachusetts*, 246 U.S. 135, 140-143. See (*Note*) 38 Harvard Law Review 361 (1924). So, too, distinguishing shadow from substance in the instant case will reveal that the court below is really asserting jurisdiction over the very subject it alleges it ignores. What the court really has acted upon, what it has really disposed of, if we forget legalistic refinements, is the license.

Furthermore, the finding of inadequacy of consideration rests upon matters within the primary jurisdiction of the Commission (Petitioners' Brief, pp. 52-60). And, further, the finding itself, requiring as it does the payment of a still higher price, encroaches upon Commission jurisdiction.

The record of the Commission, as the Government's brief points out (p. 17), has by no means been consistent in passing upon the factor of price, but in the latest case cited, *Travelers' Broadcasting Service Corp.*, 7 F.C.C. 504 (1939), the Commission in disapproving an assignment of license stated (p. 506):

> "It is by no means clear in this record that the assignee will get properties of substantial value in return for assuming this $1,500,000 obligation other than the extent to which the right to use the wave lengths is treated as valuable property."

This administrative inconsistency results from the phenomenal development in the field of radio. The letter to the Congress quoted in the Government's brief (pp. 26 *et seq.*) reflects this situation. However politic from an administrative point of view it may be for the Commission to await congressional clarification of its powers, the *law* must be applied in this case. Administrative timidity is not administrative construction. As Senator Dill, Senate floor manager for the Bill resulting in the 1934 Act, has said:

> "Subsection (b) of Section 310 . . . requires that the Commission secure full information concerning any proposed transfer, and that no transfer shall be made until the Commission consents in writing. The purpose of that provision was two-fold . . . second, to prevent the trafficking in wave lengths, that is, the selling of licenses as such.
>
> . . . . . .
>
> "The Congress did not specifically say a licensee should not transfer or sell his license for more than the value of the tangible property used for broadcasting, but *it was believed that the requirement of the Commission's consent to the transfer in writing would cause it to secure full information regarding the transaction and that because of the spirit and tenor of the law the Commission would not permit the selling of wave lengths.*
>
> "The record of transfers approved by the Commission shows that it has absolutely failed to prevent such sales. Licenses, and particularly broadcasting licenses, are sold for five and even ten times the value of the tangible property involved, so that the only thing station owners could be selling is the wave lengths." (Dill, *Radio Law* (1938), pp. 208-209.)

There has, in fact, never been a more crucial period in the radio industry than is involved in the present projection of this issue of price for radio stations. Smith, "The Radio Boom and the Public Interest," *Harper's Magazine* (March, 1945), p. 315; *Variety* (December 20, 1944), p. 19; Speech of Chairman Porter, *Broadcasting* (March 19, 1945), p. 17; testimony of Commission General Counsel,

now Commissioner, Denny, Hearings in H. Res. 21 (78th Cong. 2d Sess.) Vol. IV, pp. 4197-4198.

The supply of radio frequencies is well-nigh exhausted; new construction is impossible; earnings are artificially high and market values inflated. The implications to the public of such a trend are clearly ominous. Broadcasting was intended by Congress to be and, obviously should be, a highly personalized service resting upon the character and competence of the individual familiar with and serving the needs of a local community; but the inevitable effect of this trend will be to force this public service into the hands of investment bankers, insurance companies, and other large aggregations with the wealth necessary to buy a station. Chairman Porter of the Commission, in a recent speech, has sounded a warning against the participation of Wall Street in this public service (*Broadcasting* (March 19, 1945), pp. 17 *et seq.*). And there is a recent harbinger, in the announcement of the proposed purchase of KHQ, a 5 kilowatt station in Spokane, Washington, for $850,000, by investment bankers (*Broadcasting* (April 9, 1945), p. 17), of what will be the rule unless the trend to higher and higher prices is stopped. The judicial imposition of standards fostering that trend is hardly to be commended. The failure of the Commission thus far to use its power to stop this spiral is insufficient ground for the State courts assuming authority to give an impetus in an opposite and more dangerous direction by fixing values founded on the capitalization of the license. And the Commission itself has now felt impelled to discharge its responsibilities as the result of the great increase in station prices. See Appendix, *infra*, p. 51.

The present consideration is, obviously, at the upper limit permissible, short of going beyond going-concern value and attributing property to the license itself. The Government itself recognizes that the rental alone already involves "an expectancy that the license will be continued, which would cease with a termination of the license." (Brief of United States, p. 17.) The effect of the judgment below will be to require an even higher price. This,

the Government recognizes (Brief, p. 16), "will bear upon the Commission's exercise of the authority committed to it by the Communications Act." The same result, indeed, is inevitable under the procedural strategy recommended by the Government. For there, too, the State court is permitted to have the whip hand to force an even higher price.

IV

THE JUDGMENT BELOW CANNOT BE SUPPORTED ON THE GROUND OF INADEQUACY OF CONSIDERATION, SINCE THAT FINDING IS INTERMINGLED WITH A CONCLUSION OF LAW ON FEDERAL QUESTIONS AND WITHOUT SUPPORTING EVIDENCE, WHICH THIS COURT WILL, ACCORDINGLY, REVIEW TO PREVENT DENIAL OF A FEDERAL RIGHT

The judgment must fall, in any case, since it rests on a finding involving a violation of federal statute and is without supporting evidence. In such a case this Court will itself review the record to determine whether conclusions of law on federal questions were intermingled with the finding of fact and the denial of the federal right is without fair support. The finding of inadequacy of consideration is an essential ground of the judgment below. Yet, however the judgment be framed, it deprives petitioner WOW, Inc. of its federally granted license. That finding necessarily involves attributing a property right to the federal license contrary to the Communications Act and is thus left without any evidence in the record to support it. The judgment, itself, therefore, depriving petitioners of their property without due process of law and denying them the federally granted license without any supportable basis, must fall.

The Supreme Court of Nebraska, in its opinion of March 10, 1944 (R. 745 *et seq.*), considered *seriatim* a number of grounds advanced for upsetting the transfer of Radio Station WOW. It concluded in petitioners' favor on the following: (1) the "first question" as to the power of the directors of the Society to lease the station (R. 747-48); (2) the "next question" as to modification of the lease (R. 748); (3) the "charge" that the dominant pur-

pose of the transfer was to utilize the station to propagandize for the public power movement (R. 753-54); and (4) the "further charge" as to the plan of the officers to procure a benefit and profit for themselves, friends and associates (R. 754). On this charge the Court said:

> "The record discloses that none of the officers and directors of the Society have any interest in lessee nor any agreement with anyone, by which they have now or may in the future claim any interest therein. None of them have any interest in the purchase of the Nebraska Power Company property by Consumers, either directly or indirectly. . . . Fraud is never presumed but must be established by whoever alleges it and in examining the record we fail to find any evidence of actual fraud on the part of the officers and directors of the Society" (R. 754-755).

The Court then considers the "next question" of whether there was "legal or constructive fraud" (R. 758). It said:

> "If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof" (R. 756-757).

This involved a combination of three distinct elements: (a) inadequacy of income; (b) terms and conditions of the lease, and (c) facts leading up to the consummation of the lease. The court expressly excluded the possibility that any one or a combination of any two of these constituent elements would adequately and independently support the judgment of the court, and made clear that it required a combination of all three for an adequate support of its judgment. We are not left to conjecture. There is no question that inadequacy of consideration is an essential basis for its judgment.

That finding, however, cannot be supported. It is well settled that where denial of a federal right is involved, as here, this Court will review the record and itself determine

whether conclusions as to federal questions are intermingled with the finding and whether it can be supported by evidence in the record. As this Court said in *Kansas City So. Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591, 594:

> "While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. . . . When due regard is had for the rule before indicated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence, which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the Federal rights set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the resume which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the interpretation and application of the interstate commerce act. . . ."

Again, in *Creswill* v. *Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261, the Court said:

> "While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) that where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the

facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

See also: *Stanley* v. *Schwalby*, 162 U.S. 255, 278-279; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U.S. 655, 668-669; *Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 744-745; *State Tax Comm. of Utah* v. *VanCott*, 306 U.S. 511, 514; *United States* v. *Pink*, 315 U.S. 203, 217.

In the present case, the finding of inadequacy of consideration necessarily rested upon a valuation of the rights contained in the license contrary to the Communications Act and is otherwise without any supporting evidence. A comparison of the rental alone for the transfer of the station, an average of $74,000 per year (R. 756)—leaving entirely aside the other very valuable considerations (see *infra*, pp. 47-48)—and the value of the properties leased, at the outside $174,000 (R. 581), makes clear that a finding of inadequacy of consideration here can rest only upon the value inhering in the Federal license to broadcast (see *supra*, pp. 7-9). The income of recent years relied upon by the court (R. 756), as well as the higher price which the judgment below requires will, as the Government aptly states (Brief, p. 17), "cease with a termination of the license."

We think it clear that the transfer of the station cannot be invalidated by thus valuing the rights granted by the federal license. In the license it formerly held, the Society owned nothing upon which the Nebraska Court could place a value as a basis for a finding that the consideration was inadequate. The Society did not own the monopolistic privilege of using a frequency. It was merely the licensee of a privilege, granted by the public, to use the frequency; and that, for only a limited period of years—a maximum of three under the statute (Section 307(d)).

Indeed, the Communications Act clearly forbids any recognition of a property right in the frequency. The very purpose of the Act, as declared by Section 301, is "to provide for the use of" radio channels, "but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license

shall be construed to create any right, beyond the terms, conditions, and periods of the license." And Section 309(b)(1) prescribes that a "license shall not vest in the licensee . . . any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein." Yet, the finding must rest on a valuation which at the least is largely attributable to "an expectancy that the license will be continued" (Brief of United States, p. 17); in other words, it is predicated on a property interest inhering in the license. Plainly, a holding that the Society can sell its station properties only at a figure which involves payment for the frequency attributes an essential incident of ownership or dominion over the licensed frequency—a "right" in the "use of the frequency" beyond the "term" of the license and in a manner other than "authorized" therein—contrary to the statute. For that reason alone, the judgment below must fall.

Once this improper factor is removed, moreover, the record is entirely devoid of any support for the finding that the consideration to be paid is inadequate. An analysis of the record shows the following:

The Society by the terms of the lease contract leased certain designated broadcast facilities for a rental of $1,111,896 for 15 years. Other highly valuable considerations accrued to the lessor under the lease. These are set out in the text at pages 52-55 of our first brief. One of the most important elements is the obligation of the lessee to keep abreast of all improvements in the art and to purchase and install equipment to that end. This means not only an initial outlay of hundreds of thousands of dollars by the lessee in purchasing frequency modulation and television broadcast equipment, but the equally important burden of several years' substantial operating losses during the infancy of these new developments. Thereafter, at the termination of the lease, the entire establishment as improved and expanded is to be returned to the Society.

Aside from the foregoing considerations passing directly from lessee to lessor, the Society obtained certain other substantial and desirable benefits. In order to realize them, the directors of the Society were compelled to adopt a

policy of disposing of the station. These benefits which are of a continuing nature are:

(a) By disengaging itself from the operation of the radio broadcasting business, purely commercial in nature, the Society has eliminated a real and dangerous threat to the tax-exempt status of its broad operations as a fraternal benefit life insurance society (R. 202-208, 289, 293, 297-298, 301-305). (It was of course realized that the sale could not be made on the basis of tax exemption benefits but that it must be effected to purchasers who are fully taxed with a consequent great impairment of net income (*e.g.*, R. 291-292, 314-315).)

(b) Disturbing dissension between the personnel of the radio department and the insurance department of the Society, due to wage differentials has been removed (R. 319).

(c) The officers' and directors' energies and attention are no longer divided between the affairs of the station and the primary affairs of the Society, to-wit, the writing of life insurance and protecting the vast investments underlying the insurance (R. 289, 317).

Supporting the adequacy of the income as shown by the terms of the lease, the officers and directors of lessor, who had operated the radio station since its construction, and after having made diligent effort for more than five years to make a disposition of the radio station most beneficial to the lessor Society, testified that the income of the lease was far in excess of any offer that they had been able to secure from any other source (*e.g.*, R. 287 *et seq.*). Eminently successful business men in various commercial activities in the city of Omaha expressed their judgments that the income was adequate for the property leased, and in addition confirmed the judgments of the officers and directors of the Society that it was to the best interest of the Society to be relieved of the operation of the radio station, in order that they might concentrate their energy on its primary business of insurance. (*E.g.*, R. 512-515.)

Even more convincing were the leading executives in the radio broadcasting industry of this nation who testified

from their experience in having purchased, sold and leased principal radio properties in this country, and expressed their opinions upon the question of adequacy of the consideration received by the Society under the lease: Niles Trammell, President, National Broadcasting Company (R. 544-545); J. Harold Ryan, President, National Association of Broadcasters (R. 582); Gardner Cowles, Jr., President, Iowa Broadcasting Company (R. 619); Joseph O. Maland, Vice President, Radio Station WHO, Des Moines, Iowa (R. 647); Harold Hough, President, Oklahoma Broadcasting Company, Inc. (R. 640). These opinions were unanimous that the consideration was adequate. They are set out in our first brief (pp. 52-53). No witness testified to the contrary. The court below disposed of this uncontradicted evidence by stating *"we do not agree with their opinion"* (R. 760). The Government does not agree with the Nebraska Court but with the uncontradicted testimony of these witnesses, as evidenced by the following statement in its brief (pp. 16-17):

> "The physical property of the station, over which alone the court claims jurisdiction, is worth not more than $175,000. The radio station, which includes the physical property, the license, and the good will and going concern value, was leased by the Society to Radio Station WOW, Inc. for a fifteen year term under an agreement which the court found provided an average net rental of $74,000 per year. This the court held to be inadequate (R. 756). Capitalizing this figure (cf. R. 513) produces a value of approximately $1,000,000, attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued, which would cease with a termination of the license."

The ground for denying the federal right, therefore, is insupportable and the judgment resting thereon must fall.

CONCLUSION

In conclusion we submit the State court is without jurisdiction to nullify the license or to hamper the administrative agency in the exercise of its licensing functions. Any effort to separate the license and the property is unrealistic

and worse than futile and is contrary to the basic character of this entire case. To permit the State court to remove the licensed property is to endow it with the authority to close down an essential public service and to nullify the license by the legally quickest and practically most effective method.

It must be emphasized, this is not a case of procedural strategy but one of basic jurisdiction to set aside a single transaction involving wholly one unified operation.

Moreover, it is submitted that this Court will not send down a mandate authorizing the State court to provide for a still higher price, thus necessarily evaluating as a property interest the public frequency contrary to the statute and to the great social policy sought to be effectuated thereby.

Finally, on the one point essential to respondent's case on the merits—inadequacy of consideration—the entire record refutes the conclusion of the Nebraska Court. Under settled principles this Court will not permit the denial of a federal privilege in such a case.

We can but submit that the State court is without jurisdiction and the respondent's petition must be dismissed.

Respectfully submitted,

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APPENDIX

On March 9, 1945, an application was filed with the Commission for its approval of the transfer of license of Broadcast Station WINS, New York City, operating on 1010 kilocycles with 10 kilowatts power and holding a construction permit to increase power to 50 kilowatts. The price proposed to be paid for the station is $1,700,000. (See *Broadcasting* (April 16, 1945), p. 61). On April 10, 1945, the Commission designated this application for hearing (Docket No. 6755) on the following, among other, issues:

To determine the value of the physical assets of station WINS.

To determine the going-concern value or goodwill of station WINS.

To obtain full information concerning the various elements that entered into a determination of the purchase price for Station WINS.

To determine whether any consideration is being paid for the frequency.

To determine what portion of the consideration is attributable to assignor's outstanding construction permit to operate with 50 kilowatts power.

. . . . .

To determine whether the sale of station WINS, when viewed in the light of other applications pending and other transfers and assignments of stations to and from the assignor or persons under common control with the assignor, constitutes trafficking in licenses.

To determine whether the purchase price proposed to be paid by assignee for Station WINS will adversely affect its ability to operate in the public interest.

. . . . .

To determine whether, in the light of evidence adduced on the foregoing issues, public interest would be served by approval of the assignment of license of Station WINS.

FILE COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1934

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DAN E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, E. A. BELLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

VS

HOMER H. JOHNSON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF OF RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

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BRIEF OF RESPONDENT IN OPPOSITION

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STATEMENT

The primary purpose of this action was to cancel a radio station lease procured by fraud. The petitioners, from the time the action was commenced, acknowledged that the court had jurisdiction to determine that question, and in fact asked it to do so. Not until after the court below ordered that the lease be canceled for such fraud did the petitioners question the jurisdiction of the court to decide that issue. It was first asserted in petitioners' motion for rehearing that the Federal Communications Commission, hereinafter referred to as the Commission, had exclusive jurisdiction to determine whether the lease was procured by fraud.

Respondent believes *certiorari* should be denied because (1) A federal question was not properly or timely raised; (2) The claim that the Commission has exclusive jurisdiction of a question of local law involving a radio station is so frivolous as to present no substantial federal question; (3) The decision is sustained on non-federal grounds that under local law the lease is void; and (4) No question of public interest or of substance is involved.

These reasons will be discussed after making a supplemental statement of the case and restating questions presented. The discussion of these reasons will be followed by a consideration of the sufficiency of the grounds asserted by petitioners.

SUPPLEMENTAL STATEMENT OF THE CASE

We deem it necessary to correct certain inaccuracies and omissions in petitioners' statement of the case in order that it contain all that is material to the consideration of the question presented. We believe it will be

less confusing to state all the material facts rather than to call attention to inaccuracies and omissions in petitioners' statement.

1. On October 3, 1942, the petitioner, Woodmen of the World Life Insurance Society, hereinafter referred to as the Society, or lessor, leased its radio station for 15 years to petitioner, Radio Station WOW, Inc., hereinafter referred to as lessee, and subject to the approval of the Commission, assigned to the lessee the license to operate the station (R. 21-27).

2. On October 7, 1942, lessor and lessee filed a joint application with the Commission for consent to transfer the license to operate the station (Ex. 29, R. 376, 375).

3. On November 23, 1942, respondent, as a member of the lessor, commenced this action to cancel the lease and assignment of the license because they were procured by fraud from the lessor (R. 1-10).

4. On December 15, 1942, the Commission consented to the assignment of the license providing the assignment was made within 30 days (Ex. 32, R. 662, 661).

5. On January 5, 1943, the lessor and lessee filed a joint petition with the Commission, setting forth the pendency of respondent's action, and requested an extension of time for the assignment of the license "until final adjudication of the action" (Ex. 33, R. 667-669, 663).

6. On January 12, 1943, the Commission denied the aforesaid petition (Ex. 34, R. 664). No appeal was taken from that order.

7. On January 14, 1943, the station and license were transferred by lessor to lessee (R. 177).

8. On March 15, 1943, the trial court held that respondent had not established fraud and dismissed the case (R. 735-737).

9. On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be canceled (R. 744-745). On the same day an opinion was filed holding that the lease and assignment were fraudulently procured from the lessor (R. 745-761).

10. On March 30, 1944, petitioners filed a motion for rehearing and for an affirmance of the judgment of the district court dismissing the action. It was asserted therein, *and for the first time,* that the Nebraska courts had no jurisdiction of the action because exclusive jurisdiction was vested in the Commission and the decision deprived them of their property in violation of the Constitutions of the United States and of Nebraska (R. 769-775).

11. Thereafter, on March 30, 1944, petitioners filed a motion to dismiss the action because the court had no jurisdiction over the subject matter, and exclusive jurisdiction was in the Commission (R. 775-6, 782).

12. On May 26, 1944, the court denied the motions for rehearing and to dismiss (R. 793-794). On the same day it filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license; that there never had been any contention to the contrary; that the jurisdiction of the state court to determine whether the lease and assignment were procured by fraud could not be properly questioned for the first time after the decision of the court was rendered; that under the Nebraska practice the constitutional questions

could not be considered because not raised in the trial court (R. 794-799).

QUESTIONS PRESENTED RESTATED

We believe the jurisdictional questions presented, as set forth by petitioners (Pp. 3-4) may be more accurately stated as follows:

1. Whether the provisions of the Communications Act conferring on the Commission authority to decide whether the tranfer of a *license* to operate a radio station "is in the public interest," gives the Commission exclusive jurisdiction of all actions relating to radio stations and deprives a state court of jurisdiction to determine a question of local law relating to the station, such as the cancellation of a *lease* of a station because of fraud in its procurement.

2. Whether a decision of a state court holding that a lease of a radio station should be canceled because of fraud in its procurement and directing that the station be returned to the owner but holding "the question of the federal license being a question solely for the Federal Communications Commission," deprives the lessor or lessee of any rights claimed under the Communications Act, or deprives them of their property without due process of law in violation of the Constitution of the United States.

The only statute involved is Sec. 310 (b) of the Communications Act of 1934, as amended, 47 U. S. C., Sec. 310 (b). Subsequent references to the Communications Act are to Sec. 310 (b) unless otherwise stated.

SUMMARY OF RESPONDENT'S ARGUMENT

Respondent's argument will first discuss four reasons why *certiorari* should not be granted, and will then consider the sufficiency of the grounds asserted by petitioners. The reasons why *certiorari* should not be granted are:

I. A federal question was never properly raised

(a) The petitioners did not question the jurisdiction of the court until the filing of their motion for rehearing.

(b) Petitioners specifically recognized the jurisdiction of the court and asked the Commission to extend the time for transferring the station until "the rights of the parties should be fully adjudged in said action," referring to *this* action.

(c) The court, in denying the motion for rehearing, did not base its decision solely on a federal question.

II. No substantial federal question is involved

(a) No sound basis exists for the claim that the Commission has exclusive jurisdiction of actions of every character involving a radio station, including one to cancel a lease procured by fraud.

(b) The jurisdiction of the Commission is limited to protection of the public interest in the proper operation of radio stations and does not extend to controversies of a private nature.

(c) The assertion that the local question of fraud in procuring the lease must be determined by the Commis-

sion is so frivolous as to present no substantial federal question.

III. The decision is sustained on non-federal grounds

(a) The determination of the question as to whether the lease of the station was procured by fraud is one of local law and the decision of the court below that the lease is void because of such fraud is a non-federal ground.

(b) The holding of the court below that the so-called federal grounds had not been properly raised under the Nebraska practice is a non-federal ground.

IV. No special or important reasons exist for granting certiorari

(a) The petitioners have not been improperly deprived of any rights.

(b) Petitioners have had a fair hearing in a court which they especially asked to decide the case on its merits.

(c) Petitioners claimed for the first time that the court had no jurisdiction whatever after the decision against them.

(d) The record shows that the court was fully justified in refusing to consider such a belated claim, and no question of importance to the public is involved in that decision.

I.

FEDERAL QUESTION WAS NEVER PROPERLY RAISED

The record does not show that a federal question was properly raised and preserved. It was not raised until in petitioners' motion for rehearing, and then the decision of the court below was not based solely on that ground.

The purpose of the action was to cancel the *lease* of the radio station because it was procured by fraud, and also to cancel an assignment of the *license* to operate the station for the same reason (R. 1-10).

Petitioner's brief does not clearly disclose that two jurisdictional questions are involved, *first*, jurisdiction to determine whether the *lease* was procured by fraud, and *second*, jurisdiction to determine whether the *license* to operate the station should be transferred back to the lessor. The court below, when the question was first raised in the motion for rehearing, decided that it had jurisdiction of the first and that the Commission had exclusive jurisdiction of the second, and such had always been the position of all parties (R. 794-799).

No question was ever raised by any of the petitioners as to the jurisdiction of the court to determine whether the *lease* was procured by fraud until in the motion for a rehearing. The court, in denying a rehearing, filed a supplemental opinion which held,

> "The claim of defendants that the court has no jurisdiction of the subject matter of the action is contrary to the pleadings filed by the defendants in the trial court" (R. 797).

No claim was ever made by any of the parties that the Commission did not have jurisdiction over the transfer of the *license* to operate the station. The answer filed by lessor and its officers alleged in paragraph 18 that the Commission

> "has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said station" (R. 21).

Respondent admitted the foregoing allegation in paragraph 4 of his reply (R. 36).

The answer filed by the lessee and its manager did not question the jurisdiction of the court. It merely stated the lessee was operating the station under the lease and "orders" of the Commission (R. 31).

Furthermore, both the lessor and lessee filed a joint petition with the Commission to extend the time for transferring to the lessee the station and license, stating

> "that before said transfer and assignment be made the rights of the parties should be fully adjudged in said action."

The prayer of the joint petition is that the time be extended

> "until final adjudication of the action pending in the District Court of Douglas County, Nebraska" (Ex. 33, R. 667, 669, 665).

A more complete acknowledgment of the jurisdiction of the court over this action can hardly be imagined. Petitioners who now assert the Commission has exclusive jurisdiction of this action are the very same ones who asked the Commission to extend the time for transfer of

the station and license until their rights could be "fully adjudged in said (this) action."

The petitioners filed briefs in the court below asking the court to affirm the judgment of the trial court, and there is no mention whatever of the court not having jurisdiction. In fact, in the brief filed by the lessor and its officers (Brief No. 2), it is stated on page 172,

> "It is conceded by all that the Federal Communications Commission had no jurisdiction over this litigation."

On page 16 of the same brief this statement appears, in describing the issues:

> "These appellees tried this case below strictly on the merits. We propose to submit our case upon appeal in the same manner."

The foregoing references to the record fully sustain our statement that petitioners never, at any time, questioned the jurisdiction of the court to determine the validity of the lease. Although at times the petitioners asserted the Commission had jurisdiction over the transfer of the license, which was admitted by respondent, yet they asked the Commission to extend the time for the transfer of the station and license until the rights of the parties could be fully adjudicated in this action.

The petitioners, in their motions for rehearing, first asserted that the court had no jurisdiction over any of the issues involved in the action. This was not only a new position assumed by them, but was directly contrary to their previous position throughout the litigation. *Strangely*, in those same motions, they again recognized the jurisdiction of the court by asking it to affirm the judgment of

the trial court which was a decision on the merits (R. 769, 778). The court below denied the motion for rehearing and filed a supplemental opinion in which it stated the Commission had jurisdiction over the transfer of the license only, and that such had always been the claim of the petitioners. The court below also declined to pass on constitutional questions asserted in the motion for rehearing, because not raised in the trial court as required by the Nebraska practice (R. 798).

From the foregoing it appears that a federal question was never properly raised by petitioners. In any event, it was not raised until in the motion for rehearing, which was too late, inasmuch as the court did not base its ruling solely on that ground. *Louisville & Nashville Railroad Co.* v. *Woodford*, 234 U. S. 46; *Missouri, Kansas & Texas Railway* v. *Sealy*, 248 U. S. 363; *Herndon* v. *Georgia*, 295 U. S. 441.

Petitioners have failed to sustain the burden of showing that this court has jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Even if it be assumed for the purposes of an argument that a federal question was properly raised by petitioners, yet it was not substantial in character. The assertion of petitioners that the Commission has exclusive jurisdiction of this entire action and that the state court was wholly without jurisdiction is lacking in merit. As shown before (Pp. 8-10), the parties, as well as the court below, recognized that the Commission has jurisdiction of a

transfer of the license to operate the station. The question thus remaining is whether the courts of Nebraska have jurisdiction of an action to cancel a radio station lease fraudulently procured, or whether jurisdiction of such a controversy is vested exclusively in the Commission. The mere statement of the question seems to provide the answer.

Jurisdiction of Commission is Limited to Questions That Involve the Public Interest in the Proper Operation of a Station and Does Not Extend to a Private Controversy Relating to a Station

It is apparent from the provisions of the Communications Act quoted in petitioners' brief (Pp. 22, 45-47), and the cases construing the Act, that the jurisdiction of the Commission is limited to questions that involve the public interest, convenience, or necessity in the proper operation of a station. No such question is now or ever has been involved in this action. As a matter of fact, the station is being operated for the lessee by the same personnel as it was before the transfer. It is reasonable to assume that they will continue to operate the station when it is restored to the lessor. In any event, it is admitted by all parties that the lessor's operation of the station has been excellent, and that it is one of the outstanding stations of its kind in this country. It is likewise reasonable to assume that it can continue to operate the station in that manner when the station is returned to it.

Section 310 (b) of the Communications Act, on which petitioners rely, provides in substance that a station license shall not be transferred unless the Commission "decide that said transfer is in the public interest." The

phrase, "public interest," has been described by this court in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 216, as "the interest of the listening public in 'the larger and more effective use of radio.'"

In considering the "public interest," this court has said, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the communities reached by his broadcasts."

It clearly appears from the Communications Act and cases construing its provisions that the Commission is an administrative agency and charged only with supervision of radio facilities to the end that the interest of the radio public is properly protected by securing the best possible broadcasting service. Since no such question is involved in the present case, the Commission has no jurisdiction to determine whether the lease of this station was procured by fraud. No provisions have been cited giving it such jurisdiction, and in *National Broadcasting Company* v. *United States*, 319 U. S. 190, 219, it is said: "* * * Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry."

In *Southern Broadcasting Company* v. *Carlson*, 187 La. 823, 827, 175 So. 587, 589, the following construction placed on the Commission's jurisdiction seems a reasonable one:

> "But, from the general nature of these powers and duties, and their public character, we are constrained to believe that it was not intended by the act of Congress that the Communications Commission should

be called upon to decide disputes of a personal or private nature between individuals * * *."

Obviously, the question of fraud in the procuring of the lease is a question for the determination of the Nebraska courts, and the assertion that the Commission has exclusive jurisdiction of such a question is so frivolous as to present no substantial federal question, and the petition should therefore be denied. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102; *Zuch* v. *King*, 260 U. S. 176, 177.

It Should be Assumed the Commission Will Approve Transfer of License to Lessor in Order to Assure Continuance of Station's Operation in the Public Interest

Furthermore, it appears that the petitioners are proceeding on the assumption that the Commission will not approve a transfer of the license from the lessee to the lessor. We see no justification for such an assumption. It is more reasonable to assume that the Commission will do anything that may be necessary to continue the operation of the station. Inasmuch as the court below directs the return of the station to the lessor it would seem logical to assume that the Commission will consent to the transfer of the license so that the station may be operated by the lessor just as it was prior to the making of the fraudulent lease. For the Commission to refuse such consent would be to deprive the listening public of the broadcasting facilities of the station, which would obviously be detrimental to the public interest and thus a violation of the responsibilities imposed on the Commission by the Communications Act.

A refusal by the Commission to consent to the transfer of the license would countenance and further the fraud

of the petitioners in their effort to deprive the lessor of the use of its station. It can safely be assumed that the Commission will fulfill its duty of seeing that radio broadcasting is continued by this station after it is returned to the lessor as ordered by the court below. The attempt of the petitioners to have this Court review the case on the theory that the Commission has exclusive jurisdiction and would sustain the validity of the lease, notwithstanding the fraud disclosed by the record, is so frivolous as to present no substantial federal question.

III.

DECISION IS SUSTAINED ON NON-FEDERAL GROUND

The decision of the court below is amply sustained on the non-federal ground that the lease of the station was procured by fraud upon the lessor. Furthermore, the holding of the court below that the so-called federal grounds were not properly raised under the Nebraska practice is a non-federal ground.

The question which the court below determined was the validity of the transfer of the station, while the question which the Commission determined was the ability of the lessee to operate the station after the transfer. Those questions were clearly separate ones, and the former was obviously non-federal.

The court below canceled the lease of the station and lease of space occupied by the station because of fraud, which included the following:

1. The station lease rental was so grossly inadequate as to establish fraud. It reduces the lessor's net income from the station from nearly $300,000 a

year to an average of about $74,000 a year for the term of the 15-year lease (R. 751, 760).

2. The officers of the lessor violated their fiduciary duties in making the station lease, not only as to the manner in which it was made but also because the consideration was grossly inadequate and its provisions failed to properly protect the lessor (R. 759, 760).

The Commission did not have jurisdiction of those issues nor did it consider or act upon them. As shown on page 12 its consideration of the proposed assignment of the license was, under the Communications Act, limited to determining whether the operation of the station in the public interest would be adversely affected by the transfer. The fact that the Commission approved the transfer cannot in any way be construed to be an approval of the fraudulent manner in which the lease was procured. The question of fraud practiced on the owner in procuring the lease is obviously a non-federal ground.

The effort of the petitioners to inject a federal question by asserting in their motion for rehearing that the Commission had exclusive jurisdiction was rightly rejected by the court below in holding that the petitioners, by their pleadings and conduct, had eliminated the question of its jurisdiction to determine whether the lease was fraudulently procured (R. 797).

Referring to a judgment of a state court it was recently said by this court:

> "The application by that Court of its local laws and the facts on which it founded its judgment are, of course, controlling here."

In *General Trading Company* v. *State Tax Commission of the State of Iowa*, .. U. S. .., 88 L. Ed. Advance Opinions, 914, 915.

Likewise, the constitutional questions were not considered by the court below because they were not raised in the lower court as required by the practice in Nebraska. This is not only a non-federal ground but it is also the rule in the federal courts. Recently the court said in *Yakus* v. *United States*, .. U. S. .., 88 L. Ed. Advance Opinions, 653, 671:

> "No procedure or principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Furthermore, if any question exists as to whether the decision was based on a federal or non-federal ground, the question will be resolved in favor of the non-federal ground. *Klinger* v. *Missouri*, 80 U. S. 257. The following recent statement of Mr. Chief Justice Stone appears quite applicable to this case:

> "Hence, the case stands in the same posture as those in which we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state court also made of a federal question otherwise reviewable here."

See also *Flournoy* v. *Wiener*, .. U. S. .., 88 L. Ed. Advance Opinions, 478, 482.

IV.

NO SPECIAL OR IMPORTANT REASONS EXIST FOR GRANTING CERTIORARI

The petition and brief do not disclose that petitioners have been denied any rights, that "special and important reasons" exist for granting *certiorari*, nor that the court below "decided a federal question of substance, not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 38 (5).

The absence of necessary grounds granting *certiorari* is apparent when the questions involved are considered. Respondent brought the action to cancel a lease of a radio station and assignment of license to operate it because of fraud in procuring the license and assignment. (R. 10). The court below canceled the lease, but not the assignment, and ordered the station restored to its owner (R. 744). The petitioners filed motions for rehearing, which claimed the court below did not have jurisdiction of any part of the subject of the action and that exclusive jurisdiction was vested in the Commission (R. 769, 778). This was the first time such a claim had ever been made. The motion for rehearing was denied (R. 794), and in a supplemental opinion the court below stated that the court had jurisdiction of all the questions involved, except the Commission had jurisdiction of the transfer of the license, and that such jurisdiction had never been questioned (R. 794, 797).

It is apparent from the foregoing statement of material facts that petitioners will not be deprived of any right to which they are entitled under the Communications Act.

Their only right, if any, under that act is to have the Commission decide whether the station license should be transferred back to the owner, and that right is specifically recognized and preserved by the court below.

Nor are any "special or important reasons" for granting *certiorari* disclosed. Only the petitioners are adversely affected by the decision, and no question of public interest is involved. Petitioners, after having assented to the jurisdiction of the court below and taking their chances of success, should not be entitled to secure further consideration of the case by now claiming the court did not have jurisdiction of any part of the subject matter. The following statement from *Mays* v. *Fritton*, 87 U. S. 414, shows the lack of merit in petitioners' claim:

> "It is not competent to a party to assent to a proceeding in the court below, taking his chances of success and, upon failure, come here and object that the court below had no authority to take the proceeding."

The decision does not establish any new principals or destroy any old ones. It does not decide a federal question of substance. It clearly recognizes the power conferred on the Commission by the Communications Act back to the owner. This court has always construed the Communications Act to confer on the Commission power to determine whether a transfer of a station license is in the public interest. It has never construed the Communications Act to confer on the Commission power to determine whether a license of a station should be canceled because of fraud in its procurement. No reasonable basis for such a construction exists. The question of fraud practiced on the owner of this station in procuring the lease is purely a matter of local law. It is clear that none of

to determine whether the license should be transferred

the reasons mentioned in the statute or rules justify the granting of *certiorari*.

V.

THE PETITION AND BRIEF OF PETITIONERS DO NOT DISCLOSE ADEQUATE REASONS FOR GRANTING CERTIORARI

We believe we have shown under the previous headings that *certiorari* should be denied. We will now comment under appropriate subheadings on the sufficiency of the grounds asserted in the petition and brief of petitioners.

Petitioners' Statement of "Questions Presented" is Inaccurate

Petitioners (Pp. 3-4) describe five questions presented. On page 5 hereof we have restated those questions for the sake of accuracy.

In question No. 1 petitioners mention the court "passing on the reasonableness or validity of transfers of radio broadcasting stations." We do not believe any such question is here involved. The court below did determine that the transfer of the station was invalid because the lease was procured by fraud, but no question as to the "reasonableness" of the transfer was ever considered.

In question No. 2 petitioners mention "jurisdiction over a suit to set aside, modify or review an assignment of a radio station license and a lease of the station facilities." This action did not involve a modification or review of the assignment of the license and lease. The action was to set aside the lease and assignment of the license because of fraud.

In question No. 3 petitioners mention the judgment of the court below as "annulling in legal effect the orders of the Commission of December 15, 1942, and January 12, 1943." This is not an accurate statement, for the Commission, in the first order, merely gave its consent to an assignment of the license (Ex. 32, R. 661, 662), and in the second refused to extend the time for transferring the license (Ex. 34, R. 663, 664).

In question No. 5 petitioners ask whether the decision below is contrary to the decisions of this court "by attributing valuable property interests to a radio station license in violation of the" Communications Act. No such question exists, for the supplemental opinion of the court below does *not* attribute any property interest in the license.

Petitioners Have Not Shown Any Reason or Basis For Respondent to Intervene in Proceedings Before the Commission

Petitioners (P. 8) mention the joint application filed by the lessor and lessee requesting the Commission to extend the time for tranferring the station and license until final adjudication of this action. Petitioners then state that respondent failed to take any steps to intervene in the proceedings before the Commission, and later (Pp. 32-3) says respondent's remedy was to intervene. No sound reason is suggeseted why the respondent should intervene. This action was then pending involving the validity of the lease and there was no reason for respondent to attempt to present the validity of the lease to the Commission. It had no jurisdiction of such an action. That was a question of local law which was properly within the

jurisdiction of the court below to determine and was then so recognized by the petitioners. It is significant the petitioners did not then suggest that the Commission should determine the validity of the lease, but asked that the Commission extend the time for the transfer of the station and license until the issues had been decided in this action (Ex. 33, R. 665, 667-669). When the Commission refused to extend the time the petitioners did not appeal therefrom.

Petitioners' Claim That Federal Question Was Properly Raised is Not Supported by Record

The statement by petitioners (P. 19), that the federal questions were raised and preserved by the motion and answer in the trial court is not accurate. The motion referred to is shown by reference to the record to be the motion to strike parts of the petition later mentioned by petitioners (P. 21). The motion and order overruling it were not part of the record in the court below, as petitioners' request to include it after the decision in respondent's favor (R. 785) was denied (R. 791). Furthermore, the motion does not question the jurisdiction of the court to determine whether the lease should be canceled because of fraud, but only asserts the transfer of the license was a matter exclusively within the jurisdiction of the Commission, which has always been the position of all parties (R. 785). The answer filed by those same petitioners did not question the jurisdiction of the court in any respect (R. 31). Furthermore, both the lessor and lessee requested the Commission to extend the time for transferring the station and license "until final adjudication" of this action (Ex. 33, R. 667-669, 665).

The jurisdiction of the court to determine whether the station lease should be canceled because of fraud in procuring it was never questioned in any way until the motion for rehearing filed after the decision of the court below. Previous reference to jurisdiction involved only the claim that the Commission had exclusive jurisdiction of the transfer of the license, and this was never questioned by respondent.

Petitioners' Claim That the Public Interest was Involved is Not Supported by the Record

Petitioners (P. 28) assert that the issues decided by the court below were ones affecting the public and thus came within the provisions of the Communications Act. The court below decided that the lease of the station was procured by fraud, and therefore ordered it canceled. Such a decision would not in any way affect the public interest, for as that term is used in the Communications Act it refers to the listening public. Whether the station was operated by the lessor or the lessee would not make any difference to the listening public, for the management remained the same.

There is nothing in the record to support petitioners' statement (P. 29) that the Commission "had a paramount concern, from the standpoint of the public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court solely from the standpoint of supposed private rights." The only concern of the Commission was whether the station would be operated properly. It was undisputed that the operation of the station had been very satisfactory prior to the lease, and the application specifically stated that "peti-

tioner Gillin will continue to be general manager of WOW and no changes in staff are contemplated" (Ex. 29, R. 376, 397, 375). The financial statement submitted with the application apparently satisfied the Commission that the lessee had sufficient capital to properly operate and maintain the station. It appearing to the Commission that the lessee had competent management and adequate capital to operate and maintain the station, it gave its consent to the assignment of the license.

The court below did not find inadequate "those financial and managerial arrangements." The finding that the transfer of the station under the lease should be canceled because of fraud, did not relate to the operation of the station by the lessee. *Heitmeyer* v. *FCC*, 95 Fed. 2nd 91, cited by petitioners (P. 30) does not support petitioners' claim that the Commission had jurisdiction over all questions relating to the station, including the cancellation of the lease. The court there recognizes that the interest of the Commission is in the continuance of a properly operated station. No such question has ever been involved in the present case.

The Communications Act did not place on the Commission any duty to determine whether lessor was receiving adequate consideration for the lease, and there is nothing in the record to show that the Commission ever considered that question. The effort of petitioners to extend the jurisdiction of the Commission to a determination of the adequacy of the consideration to be paid by the lessee is manifestly unsound. The fact that the lessor might receive an inadequate rental could not in any way affect the proper operation of the station.

Petitioners' Claim That Commission Has Primary Jurisdiction of All Questions Relating to Radio Cannot be Sustained

Petitioners (P. 31), assert that the primary jurisdiction doctrine applies to the Commission. If we assume that it does, it did not affect its jurisdiction in this case. The cases cited by petitioner show that administrative agencies such as the Interstate Commerce Commission have primary jurisdiction only of matters committed to them by statute. The matters thus committed to them are ordinarily problems of administration, such as regulation of rates and operations. Not one of the cases cited hold that any such agency has exclusive jurisdiction over *every* question relating to the properties with which it is concerned. Such construction of the applicable statutes would be unreasonable. For example, what justification would there be for holding that the courts in Nebraska would not have jurisdiction of an action to cancel a lease of a railroad depot in Omaha, alleged to have been procured by fraud, because the Interstate Commerce Commission had exclusive jurisdiction of the regulation of the operation of railroads.

Marony v. *Applegate*, 266 App. Div. 412, 42 N. Y. S. (2d) 768, cited by petitioners (P. 32) is not in point because the statute under which the Interstate Commerce Commission functions specifically directs it "to prescribe a just division of joint rates among carriers," and so the court held a suit could not be maintained for unfair division of rates until the Commission had first determined what division would be fair. In the present case no provision of the Communications Act directs the Commis-

sion to determine whether a lease rental of a station is adequate or whether the lease has been fraudulently procured.

Likewise, in the other cases cited by petitioners under that heading, the agency was held to have primary jurisdiction, because the issue involved was one specifically delegated to it by the statute.

Furthermore, the doctrine does not hold that the administrative agency has *exclusive* jurisdiction, but only *primary* jurisdiction. In *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, cited by petitioners (Pp. 21, 31), it was held that the lower court had jurisdiction of an action to recover additional compensation for use of cars, but that the Interstate Commerce Commission should be first permitted to determine as an "administrative problem" the reasonableness of practices with reference to the amount allowable for use of cars. It is obvious that a question of a railway charge is one over which the Interstate Commerce Commission has jurisdiction, as the court found, it was an administrative problem.

Even if the primary jurisdiction doctrine is applied it should not affect the decision of the court below, because no claim was ever made that the Commission had primary jurisdiction until after the decision by the highest court in Nebraska. The failure of the petitioners to have made a timely claim that the Commission had primary jurisdiction would seem to constitute a waiver of any such claim.

Petitioners' Claim That Commission Has Exclusive Jurisdiction Cannot be Sustained

Petitioner (P. 34) asserts that the court below erroneously concluded that "the fact that the property involved was used in a licensed business was an incident to the suit only." We believe the court's statement is fully supported by the record and the decisions of this court. Certainly, the cancellation of the *lease* of the station was the primary purpose of the action, and the cancellation of the transfer of the *license* was merely an incident. When the lessor and other petitioners alleged in their answer that the Commission had jurisdiction of the transfer of the license only (R. 21), respondent admitted that allegation in his reply (R. 36). This, in effect, took that issue out of the case, and the court proceeded to determine the other issues. There is no more basis for claiming that the Commission has jurisdiction of any action relating to the station simply because it has issued a license for the operation of the station that there is to claim that a state administrative body which issues licenses for the use of automobiles has exclusive jurisdiction of every action in any way relating to an automobile.

A situation somewhat analogous to the present case has arisen in connection with litigation involving patents and trademarks. It has been uniformly held that even though such litigation may involve the ownership of patents granted by the Federal government, yet state courts have a right to decide controversies with reference thereto. In *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, the court held that evidence of the invalidity of a patent and its infringement of a prior patent would not oust the jurisdiction of a state court in an ordinary action of *assumpsit*, the ques-

tion of the invalidity of the patent being incidental to a defense of the lack of consideration and of a rescission of the contract.' The court further held that the power of state courts to determine questions arising under the patent laws is not precluded by the federal statute excluding them from jurisdiction of cases arising under those laws. On this subject the court said:

> "the state court had jurisdiction both of the parties and the subject-matter, as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of the defenses, the defendant claimed the invalidity of a certain patent."

See *Becher* v. *Contoure Laboratories*, 279 U. S. 388, for a similar holding. Likewise, in the present case the state court's jurisdiction over the question of the validity of the lease of the station could not be "ousted" because the license to operate it was under the control of the Commission.

Petitioners (P. 37) cite *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127, to support their claim that the court below did not have authority to vacate an order of the Commission. The Commission did not order the transfer of the license, but merely consented to such transfer (Ex. 32, R. 661, 662). The foregoing case is distinguishable from the present case in many respects. In that case the court found "that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission" authorizing and approving the issuance of bonds in payment for equipment. The statute gave the Commission exclusive jurisdiction of questions involving the issuance of bonds. In the present case there was no order to vacate and the Commission never authorized or ap-

proved the leasing of the station. Its consent to the transfer of the license was only an incidental matter, and the Communications Act gives the Commission no jurisdiction to determine the validity of the station lease, which was the main issue in the present case.

No cases have been cited by petitioner where the Commission has been held to have jurisdiction over the transfer of a license unless it was claimed the proposed transfer would be detrimental to the interest of the public either because the assignee was not properly qualified to operate the station or the territory was already adequately served by other stations. Nor have any cases been cited holding that the Communications Act vests in the Commission exclusive jurisdiction of *all* questions relating to radio broadcasting stations and equipment, and we do not believe any can be found, for such a construction of the Act is unjustified.

The Commission itself has recognized that it does not have jurisdiction of all questions relating to stations and their equipment. In the Matter of Buffalo Broadcasting Corp. (WKBW), 9 F. C. C. 31, 32, a petition to intervene was filed by a mortgagee of a station's equipment to oppose the granting of a construction permit to move the station without provision for giving petitioner security on the proposed new equipment at the new site. The petition was dismissed because "the enforcement of the * * * contract between petitioner and" the station "with respect to security required thereunder * * * *is a matter over which the Commission has no jurisdiction.*" The petition was "dismissed without prejudice to any contract or property right of petitioner or *its right to proceed before other tribunals.*" (Italics supplied).

Thus, the Commission itself has rightly recognized that if does not have exclusive jurisdiction of all matters relating to stations.

Petitioners' Claim That Non-Federal Grounds Do Not Exist is Contrary to the Record

Petitioners' statement (P. 38) that the court decided all non-federal grounds in their favor is contrary to the record. The court below found that the lease was procured by fraud because it was made by the officers of lessor in violation of their fiduciary duties as such officers (R. 759, 760); and because the rental to be paid thereunder was so grossly inadequate as to establish fraud (R. 751, 760). Both of those are non-federal grounds.

Petitioners' statement (P. 38) that "the decision below was plainly based on financial and managerial aspects of the station lease, an assignment of license within the primary jurisdiction of the Federal Communications Commission and upon which the Commission acted" is likewise contrary to the record. The court below based its decision on the fraudulent character of the lease, while the Commission apparently based its consent to the assignment of the license on the showing that the lessee was competent to continue the proper operation of the station (Ex. 29, R. 376, 397, 375). The jurisdiction of the court below related to the validity of the transfer of the station. The jurisdiction of the Commission related to the proper operation of the station after the transfer. The court below clearly recognized the two jurisdictions and based its decision on the non-federal ground.

Petitioners' Claim That the Commission Has Jurisdiction of Proceedings to Cancel a License Has No Application to the Present Case

Petitioners (P. 39) state that "even in cases of actual fraud" the Commission "must decide whether license cancellation is in the public interest," and a proceeding before the Commission involving cancellation of a license is cited. Neither the statement nor the case are applicable, because the *cancellation* of a license is not involved in the present case. The proceedings cited is In the Matter of the Revocation of License of the Panama City Broadcasting Co. (WDLP), 9 F. C. C. 208, where the Commission refused to *revoke* a license to operate a station which was fraudulently procured from the Commission. The proceeding is clearly distinguishable from the present action because (1) It involved *cancellation* rather than *transfer* of a license; (2) A fraud was committed on the Commission in securing the license, and Section 312 (a) provides for revocation of a license by the Commission "for false statements either in the application or in * * * (other) statements of fact" required by the Commission; (3) the license was for the only station in the community and the Commission found that if it revoked the license the community would be deprived of radio facilities; thus the public interest would be best served by the continued operation of the station.

Petitioners' Claim That Court Attributed Property Interest in Station License is Contrary to the Record

Petitioners' statement (P. 40) that the decision attributes valuable property interests to the station license is directly contrary to the record. The supplemental opinion states:

"Such a license is a permissive grant of a privilege and creates no vested property rights in the licensee." (R. 797). Petitioners state (P. 40): "It is difficult to understand a finding of gross inadequacy in an annual rental of $74,000 a year for physical properties originally costing $175,000." The station earned $287,437.74 net profit in 1942 (R. 751), and the rental, which is about one-fourth of that amount, is obviously grossly inadequate. While the station originally cost $175,000, it is undisputed that improvements and new equipment were constantly added, so that its present value is undoubtedly much greater than $175,000. In any event the court will accept the finding of fact by the court below that the rental was grossly inadequate and that the license "creates no vested property right in the licensee."

Petitioners' Claim That the Case is of Vital Public Importance is Not Supported by the Record

Petitioners state (P. 41) that the public is faced with a dilemma because under the decision of the court below the station is to be returned to the lessor but the lessee retains the license. That is hardly a fair reflection of the situation. The judgment orders "That generally everything be done to restore the parties to their original position prior to the entering into of the lease," (745), which would include an application to the Commission for consent to transfer the license to the lessor. It would seem reasonable to assume that the Commission would give its consent. The lessor's successful operation of the station for nearly 20 years assures its ability to continue that operation.

It cannot be assumed that the Commission would refuse its consent to the transfer of the license to the lessor,

for that might deprive the listening public of the broadcasting service of the station, and also would be condoning the fraud which wrongly deprived the lessor of the station. If the lessor desires to then lease the station for an adequate rental or sell it, no doubt the Commission would consent to a transfer of the license to a properly qualified lessee or purchaser, so that the public will continue to receive the broadcasts from this station.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition sets forth no substantial ground for the granting of *certiorari*, and that the petition should be denied.

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Dated October 31, 1944.

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No. 583

In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

V.

HOMER H. JOHNSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENT

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In the
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OCTOBER TERM, 1944

No. 593

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RALPH W. SLOCUM,
A. A. WHITWORTH,
Of Counsel

PRELIMINARY STATEMENT

It is desirable to first correct some erroneous conceptions of this action which appear in petitioners' brief.

First, the primary purpose of this action was to declare void and cancel a fraudulent *lease* of a radio station. The *license* to operate the station was only incidentally involved and there was never any claim that its transfer to the lessee was fraudulent. While the prayer did ask that the assignment of the license as well as the lease be declared void and cancelled (R. 10), the cancellation of the license was eliminated by the pleadings and so held by the court below in its second opinion (R. 798). Petitioners repeatedly refer to the cancellation of the license despite the fact that it was eliminated as an issue (All italics herein are supplied).

Second, the interest of the listening public was not involved for it is conceded that the station has been well operated by the Society and by the lessee.

If considered on its merits the fundamental question before this court is whether the Communications Act is to be construed to give the Commission exclusive jurisdiction over the subject matter of this action and thus deprive the court below of jurisdiction to cancel the fraudulent lease. *This question was not raised by petitioners until after the lease had been ordered cancelled by the court below.* We make this statement of the fundamental question because so much of petitioners' brief is devoted to a discussion of immaterial matters and criticisms of the decision of the court below thereon.

There are a number of inaccurate statements in petitioners' brief due probably to the fact that Mr. Fly, who submitted the brief for petitioners, has only recently ap-

peared in the case. The record is voluminous and it is understandable that inaccurate statements might be made by one who had not been connected with the case in the trial court or the court below. Consideration of this question is also rendered difficult because petitioners completely changed their position after the court below reversed the trial court. Prior to that time they had acknowledged the court's jurisdiction to determine the validity of the lease, but since then, they contend the court had no jurisdiction whatever. (The record and briefs show numerous changes of petitioners attorneys.)

PETITIONERS STATEMENT ON QUESTIONS PRESENTED

It is respondent's contention that none of the questions listed by petitioners (p. 2) present a question which justifies this court in reviewing the case on its merits. When analyzed the rights claimed in two of them (3 and 5) were specifically recognized by the court below and the remaining ones were not considered by it because not raised at all or not in time (R. 798). Therefore, since no federal rights "specially set up or claimed" by petitioners have been denied, no question is presented under Sec. 237 (b) of the Judicial Code.

The only question that could possibly be considered is whether the Communications Act confers exclusive jurisdiction on the Commission of this action and therefore the court below was without any jurisdiction whatever of the subject matter of the action. Some changes have been made by petitioners in the questions from their wording as they appear in the petition for certiorari (p. 3). Question 5 which appears as 3 in the petition for certiorari has been changed by omitting the word "exclusive", pre-

ceding "jurisdiction," and by adding at the end the words "and by deciding matters affecting the public interest." These questions will be discussed later.

ADDITIONAL STATEMENT OF THE CASE

We believe it will be helpful to first state all material occurrences in chronological order and then call attention to certain inaccuracies in petitioners statement of the case.

Material Occurrences

1. On October 3, 1942, the petitioner, Woodmen of the World Life Insurance Society (hereinafter referred to as the Society, or lessor) leased its radio station for 15 years to petitioner, Radio Station WOW, Inc., (hereinafter referred to as lessee) and subject to the approval of the Commission, assigned to the lessee the license to operate the station (R. 21-27).

2. On October 7, 1942, the Society and lessee filed a joint application with the Commission for consent to transfer the station license (Ex. 29, R. 375, 376).

3. On November 23, 1942, respondent, as a member of the Society, commenced this action to have the lease declared void because procured by fraud from the Society and to cancel the lease and assignment of the license (R. 1-10). The cancellation of the assignment of the license was later eliminated by the pleadings (See p. 23 hereof).

4. On December 15, 1942, the Commission gave its consent to the assignment of the license which was effective for 30 days (Ex. 32, R. 661, 662A).

5. On January 5, 1943, the Society and lessee filed a joint petition with the Commission, setting forth the pend-

ency of respondent's action, and requested the consent to the assignment of the license be extended "until final adjudication of the action" (Ex. 33, R. 665, 667-669).

6. On January 12, 1943, the Commission denied the aforesaid petition (Ex. 34, R. 664). No appeal was taken from that order by either the Society or lessee.

7. On January 14, 1943, the station and license were transferred by the Society to lessee (R. 177).

8. On March 15, 1943, the trial court held that respondent had not established fraud and dismissed the case (R. 735-737).

9. On March 10, 1944, the Supreme Court of Nebraska entered a judgment reversing the trial court, finding that the lease to the station, the lease to the space occupied by the station, and the transfer of the license should be vacated and set aside (R. 744-745). On the same day an opinion was filed holding that the lease was fraudulently procured from the Society (R. 745-761).

10. On March 30, 1944, petitioners filed motions for rehearing and for an affirmance of the judgment of the district court dismissing the action. It was asserted therein, *and for the first time*, that the Nebraska courts had no jurisdiction of the action because jurisdiction was vested in the Commission and the decision deprived them of their property in violation of the Constitutions of the United States and of Nebraska (R. 769-775).

11. Thereafter, on March 30, 1944, petitioners filed motions to dismiss the action because the court had no jurisdiction over the subject matter, and exclusive jurisdiction was in the Commission (R. 775-6, 782).

12. On May 26, 1944, the court denied the motions for rehearing and to dismiss (R. 793-794). On the same day it filed a supplemental opinion in which it stated the jurisdiction of the Commission was only over the transfer of the license and the court had jurisdiction of all other issues; that the claim that this action was to set aside an order of the Commission was without merit and was eliminated from the case by the pleading; that there never had been any contention to the contrary; that under the Nebraska practice the constitutional questions could not be considered because not raised in the trial court (R. 794-799).

Nature of the Action

We do not accept petitioners' statement (p. 5) of the nature of the action as being accurate. So far as is now material, this is an action on behalf of all members of the Society to declare fraudulent and void and to cancel a lease of the Society's radio station because the rental payable thereunder is grossly inadequate, the provisions of the lease are inadequate to protect the Society, the lessee is without adequate financial responsibility and the officers of the Society violated their duties and the trusts reposed in them as officers in making the lease (R. 1-10).

Petitioners (p. 7) in describing the nature of the action omit numerous allegations from the petition such as the fact that the Society's net income from the station was rapidly increasing and was estimated $278,641.54 for 1942 (R. 3) and the rental payable to the Society under the lease was only an average of approximately $74,000 a year which was grossly inadequate (R. 5 and 6). Peti-

tioners state (p 7) the petition alleges the "great value of the station" but we find no such allegation.

The petition does not allege the assignment of the license was fraudulent, in fact it does not even allege the license was assigned although the prayer asks that the assignment be cancelled (R. 1-10). Cancellation of the license was specifically eliminated from the act... by the answer of the Society and its officers (R. 11, 21) and the respondent's reply (R. 35, 36).

The statement as to the petition is otherwise inaccurate and incomplete and the order in which the allegations appear in the petition have been so changed by petitioners as to require a reference to the petition itself upon any material point. This is especially true of petitioners' efforts to show that a question of public interest was involved because of allegations with reference to the threatened use of the station for propaganda purposes. This issue was eliminated by the decree of the trial court that it was not sustained by the evidence (R. 735) and the court below made a similar holding (R. 753-754).

Orders of the Federal Communications Commission

Petitioners refer (p. 8) to the inventory of the station property, income statement of the Society and balance sheet of the Society and of the lessee as being attached to the application to the Commission for consent to the assignment of the license. The documents mentioned are set forth in the appendix to petitioners' brief but none of them are contained in the record. Strangely neither the Society or the lessee, who filed the application, or their attorneys, had a copy of the application at the trial so respondent introduced a copy which he had secured but no documents were attached to it (R. 369-370, 372-373,

Ex. 29, R. 375, 376). Petitioners discuss (pp. 9-10) the consent given by the Commission to the assignment of the license but refers to it as an "order." (Infra p. 50).

First Opinion of the Supreme Court of Nebraska

Petitioners (p. 11) state that in its first opinion the court below found "that no officer or director would gain directly or indirectly by the assignment of the license and by the lease of the station facilities" (R. 745, 754-755). There is no such finding or holding in the opinion with refernce to the assignment of the license. The opinion does not discuss the circumstances under which the assignment of the license was procured.

Raising of the Federal Questions

Petitioners (pp. 11-12) state that after the judgment of the court below, they filed motions to dismiss and motions for rehearing, challenging the court's jurisdiction. The facts are that the petitioners first filed motions for rehearing (R. 769, 778) in which they asked the court "to grant a rehearing of the issues involved," and affirm the judgment of the trial court. Reasons included the claim that the court below had no jurisdiction of the subject matter and the insufficiency of the pleadings and evidence (R. 769, 778). *After* filing motions for rehearing, petitioners then filed motions to dismiss (R. 775, 782).

We will call attention in our argument to other instances where the petitioners' statements are not accurate and might unintentionally mislead the court.

SUMMARY OF ARGUMENT

I.

The Judgment Is Not Final Within the Meaning of Section 237 (b) of the Judicial Code

The judgment does not "terminate the litigation • • • so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437. A further trial will be necessary as to at least five questions.

"A judgment reversing that of the court below and remanding the case for further proceedings is not" final. *Haseltine* v. *Central National Bank*, 183 U. S. 130, 131.

Cases cited by petitioners are distinguishable because of material differences in facts such as judgments directing *immediate delivery* of property, specifically *reserving* certain issues, or the accounting ordered was only ministerial and not a part of the relief prayed for.

II.

The Federal Questions Raised by the Petition For Certiorari Were Not Properly Presented in the Record

The rights claimed by petitioners namely, the judgment invaded the jurisdiction of the Commission (1) by deciding a question of interest to the listening public and (2) by nullifying the consent of the Commission to the assignment of the license, were not "specially set up or claimed" as required by Sec. 237 (b) so as to bring them to the attention of the state court. *Green Bay and Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67-68.

The rights claimed by petitioners as to the public interest were decided *in their favor* in both courts below. The jurisdiction of the Commission over the assignment of the license was admitted in the pleadings and was so held in the court below and the so-called "order" related only to the license, so was not nullified by the judgment below. The other federal questions were not raised in the court below or were not considered or necessary to support the judgment rendered.

A judgment may not be reviewed unless the court's decision on the federal question was "essential to the judgment rendered," *Montana* v. *Rice*, 204 U. S. 291, *Lynch* v. *New York*, 293 U. S. 52, 54. The only such question was that the court below had jurisdiction of the action to cancel a fraudulent lease.

Petitioners requested the courts below to decide whether the lease should be cancelled and *never questioned its right to do so until after an adverse decision.*

III.

Communications Act Does Not Exclude the Jurisdiction of the State Court Over this Action

State courts have all judicial power not surrendered by them to the United States and federal courts should "scrupulously confine their own jurisdiction to the *precise limits* which the statute has defined." *Healy* v. *Rotta*, 292 U. S. 263-270. Jurisdiction of federal court is not exclusive unless "manifested by clear language," *Plaquemines* v. *Henderson*, 170 U. S. 511; nor is it exclusive under the commerce clause, *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 476; and it is "the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal

authority into the orderly functioning of a states' judicial process." *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 135.

The Communications Act when reasonably construed does not give the Commission and federal court exclusive jurisdiction of this action for (1) it shows it was not so intended, (2) it does not contain words which can be so construed, (3) it recognizes non-exclusive jurisdiction, (4) exclusive jurisdiction is not necessary to accomplish its regulatory purpose, (5) administrative construction is non-exclusive jurisdiction, (6) it does not contain adequate provision for determining actions of this character, (7) it would establish an undesirable precedent.

Such a construction would be tenuous, perhaps unconstitutional as usurping the judicial power of the states and should be avoided "if fairly possible," *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390.

IV.

The State Court Had Jurisdiction of the Action and Petitioners Assented Thereto

The question of fraud in procuring the lease is one that is within the general jurisdiction of the state court. Petitioners, having asked both courts below to determine that question, have no right after an adverse decision to question its jurisdiction. The primary jurisdiction doctrine is not properly before the court because not raised in the court below but in any event it is not applicable for no question requiring technical knowledge of the Commission is involved, *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139. Furthermore it was waived by not being claimed in the courts below.

The fact that the station license is incidentally involved did not deprive the state court of jurisdiction. *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, *Becher* v. *Contoure Laboratories*, 279 U. S. 388, 391.

Petitioners cannot question the jurisdiction of the courts below after assenting thereto and in fact asking a decision on the merits. This is true even where statutes confer exclusive jurisdictions on federal courts, *Mays* v. *Fritton*, 87 U. S. 414.

V.

The Judgment Below Does Not Invade the Jurisdiction of the Commission

The jurisdiction of the Commission was not invaded because the only matter in which it was interested was the license, and the judgment specifically recognized the Commission's jurisdiction thereover. Furthermore, the judgment did not nullify an order of the Commission for it was merely a consent and applied only to the assignment of the license. Respondent could not have maintained a suit under Sec. 402 (a), *Pittsburgh and W. Va. Ry.* v. *United States*, 281 U. S. 479, 486.

No question of the listening public in the continued proper operation of the station was ever involved except incidentally in connection with the claim that it was to be used for propaganda purposes. *The decision of both courts below was in petitioners' favor on this point.* There is no reasonable basis for claiming that the public interest would be served by now holding valid the lease which was fraudulently procured.

ARGUMENT

I.

JUDGMENT IS NOT FINAL WITHIN THE MEANING OF SECTION 237 (b) OF THE JUDICIAL CODE

No final judgment was entered by the court below. A further trial of importance will be necessary before a final judgment or decree can be entered by the trial court. Examination of the judgment (R. 744) discloses that evidence will be required in the trial court on at least five of its seven "directives" listed by petitioners (p. 17).

Evidence will be required to identify the $25,000 of accounts to be returned. Some have probably been paid and lessee will therefore have to account for the amount collected. Accounting for the operation of the station since January 14, 1943, will require evidence to determine the income and operating expenses and there probably will be some dispute as to what items are proper operating expenses to be deducted from the income. Evidence will be required to determine what is necessary for lessee to do to accomplish the return of the license. In view of the second opinion of the court below (R. 794), this may necessitate the filing of an application by the Society and lessee requesting the consent of the Commission to the assignment of the license to the Society. Likewise evidence will be required to determine what else is necessary to restore the parties to their position prior to the lease.

Furthermore evidence will be required to determine the expenses that the Society has had in connection with the transfer of the station and license to lessee and to return to the Society which are to be paid by lessee. It is probable that there will be some dispute as to what items are to be included in such expense. Also the costs in a case of this character include compensation to respondent's

attorneys and evidence will be necessary to show the services rendered and the value thereof.

All of the foregoing matters require a consideration of the evidence offered by the parties and a decision thereon by the trial court. Such a decision is obviously of a judicial character and under the authorities now cited the judgment is not final under Sec. 237 (b).

A test of the finality of a judgment under Sec. 237 (b) of the Judicial Code is stated in *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437, as follows:

> "While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that, in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.' *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, and cases cited."

Application of the foregoing rule to the present judgment shows clearly that it is not final. If this court affirmed the judgment it cannot be said that "the court below would have nothing to do but to execute the judgment or decree it had already entered." The case was remanded to the trial court where evidence would have to be taken on the various matters mentioned in the judgment and it clearly contemplates that the final judgment will be entered by the trial court after a further trial. Under the foregoing test the judgment of the court below is not final so as to give this court jurisdiction.

Another well-recognized rule to determine the finality of a judgment is stated in *Haseltine* v. *Central National Bank*, 183 U. S. 130, 131, as follows:

> "We have frequently held that a judgment reversing that of the court below and remanding the case for further proceedings is not one to which a writ of error will lie."

Under the foregoing rule the judgment in the present case is not final because it reversed the trial court and remanded the case for further proceedings.

In *California National Bank v. Stateler,* 171 U. S. 447, it was held that a judgment on appeal reversing the trial court and directing the delivery of securities and money after making a reasonable allowance to one of the parties for costs and attorney's fees "lacks finality" in two particulars, one of which was "it would certainly be necessary for Chetwood to prove up his costs, disbursements, and attorney's fees before the amount for which he is ultimately made liable could be ascertained." By analogy, the judgment in the present case "lacks finality" because "it would certainly be necessary for" respondent "to prove up his costs, disbursements, and attorney's fees before the amount for which" petitioners are "ultimately made liable could be ascertained." The foregoing case has been cited repeatedly by this court as authority for dismissing an appeal for want of jurisdiction. One of these is *Edgar Bros. Co. v. State Revenue Commission,* 303 U. S. 626.

Petitioners (pp. 18-19) cite six cases to support their statement that the judgment is final within the meaning of Sec. 237 (b). However, an examination of these cases discloses that the first three involve the finality of a judgment of a federal court rather than a state court, which is covered by a different statute, and in those same cases the trial court ordered *immediate delivery* of the property to the plaintiff but specifically reserved certain items

for further consideration which was held to not affect the finality of the rest of the decree. Other facts as will be shown distinguish all of the cases from the present case.

In *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, and *Thomson* v. *Dean*, 74 U. S. (7 Wall.) 342, cited by petitioners (p. 19), the court called attention to the possibility of irreparable injury if an appeal was not allowed because *immediate delivery* of the property was ordered. Similar injury in the present case as suggested by petitioners (p. 19) could not occur because they retain possession, the only change being from lessee to lessor. Those cases are discussed in *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, 431, which held they did not apply. It is said:

> "There is no order as in *Forgay* v. *Conrad*, 6 How. 201; *Thomson* v. *Dean*, 7 Wall. 346, and other cases of a like character, adjudging the property to belong absolutely to the appellee, *and ordering immediate delivery of possession.*"

The Forgay and Dean cases, supra, are likewise distinguished in *Collins* v. *Miller*, 252 U. S. 364, 371.

Petitioners (p. 19) also cite *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180, which was an appeal from federal court direct to the Supreme Court. The trial court entered a decree cancelling a lease and directing the surrender and delivery "forthwith" of the leased property which was the subject of the suit and ordered that an accounting be taken before a master of profits realized from the property. The court specifically "reserved to itself such further directions as may be necessary to carry this decree into effect." The court held the decree final for the purposes of appeal because the property had been ordered surrendered "forthwith," "the accounting ordered is only in aid of the execution of the decree and is

no part of the relief prayed for in the bill," because "nothing now remains to be done but to carry what has been decreed into execution" and plaintiffs "are entitled to the immediate execution of such a decree." The present case differs in every one of the foregoing respects.

It will be observed that the basis of the decision in the foregoing case is similar to both the Forgay and Dean cases, supra. Furthermore, the court recognized that if the accounting ordered was a part of the relief prayed for in the bill, the judgment would not be final. In the present case the judgment of the court below among other directions orders an accounting of the operation of the station by the lessee and payment by the lessee of the expenses incurred in connection with the transfer of the lease and license. Respondent's petition (R. 10) did not specifically ask for an accounting of the operation of the station because at the time the petition was filed the station had not yet been transferred to the lessee. However, the petition did specifically ask that the society be paid all of its expenses incurred in connection with the lease and assignment of the license and prayed "for such other, further and different relief as equity and justice may require." (R. 10). The court below construed a prayer for general relief to be sufficient to include "any judgment to which the party is entitled under the pleadings and evidence" (R. 796). The accounting ordered of the operation of the station as well as payment of the expenses in connection with the transfer of the station under the lease and the transfer of the license constituted a construction by the court below that respondent was entitled to an accounting under the pleadings and evidence. It therefore cannot be said that the accounting of the operation of the station by the lessee and for the

expenses of transferring the station under the lease the transfer of the license "is no part of the relief prayed for."

We do not believe the foregoing cases cited by petitioners which we have discussed sustain the finality of the judgment in the present case. It is significant that in each one of them, a decree in favor of the plaintiff was entered by the trial court and directed immediate delivery of the property so that if this court affirmed the decree the trial court would have nothing to do but to execute the decree already rendered, as stated in *Georgia Ry. Co.* v. *Decatur*, supra (p. 14). In the present case, of course, there is no judgment or decree to be executed because the one entered by the trial court has now been set aside and a new one must be entered after a determination of the matters required by the judgment of the court below. If the foregoing cases should be construed to apply to the situation such as exists in the present case, they are not in harmony with many later cases such as *Keystone Co.* v. *Martin*, 132 U. S. 91, *McGourkey* v. *Toledo R. Co.*, 146 U. S. 536, *Martinez* v. *International Banking Corp.*, 220 U. S. 214, *George* v. *Victor Talking Machine Co.*, 293 U. S. 377, and *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, already discussed (p. 14).

Petitioners cite (p. 19) *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, but it does not sustain the finality of the judgment in the present case. In that case, suit was brought to recover a canal but the suit was dismissed. On appeal it was reversed and a judgment entered for the plaintiff and ordering an accounting of receipts and disbursements from the property. The right of the plaintiff in that respect was specifically ordered to "be reserved."

In holding that the judgment was final, the court said on page 372:

> "In the case at bar there is distinct and explicit finality, and the further proceedings are directed to apply only to the 'questions reserved.' And it is to be assumed this was purposely done to give finality to the questions not reserved, so that the decree could be *immediately executed* upon the property involved requiring it to be delivered into the possession and administration of the state."

It therefore appears that by directing further proceedings should apply only to "questions reserved," the judgment thus became final as to the remaining questions and therefore could be reviewed. No such situation exists in the present case.

Gulf Refining Co. v. *United States*, 269 U. S. 125, 135, cited by petitioners (p. 19), is not adverse to our contention but in fact directly supports it by stating:

> "The general rule established by many decisions, of which *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a *judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final.*"

It is true that in the foregoing case the judgment was held final although it ordered an accounting but the amount due under the accounting was an exact sum set forth in the stipulation of the parties. On this point the court said on page 136:

> "There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the

power of alteration. It follows that the jurisdictional objection is without merit."

The present case presents quite a different situation because as shown there will necessarily be evidence taken relating to the numerous issues remaining undetermined.

In *Knox National Farm Loan Association v. Phillips*, 300 U. S. 194, cited by petitioners (p. 19), a money judgment was allowed and a receiver appointed to liquidate the business of the defendant. This court held the judgment was final, but the case materially differs from the present case as shown by the following statement, 198:

> "The Association and its officers were not directed to account, and to surrender what was found owing at the close of the accounting. They were directed to make delivery and to make delivery at once."

The inference is that if an accounting had been directed as in the present case, the judgment would not have been a final one.

It therefore appears that the judgment should not be considered final under Sec. 237 (b) because it fails to meet the well established requirements set forth in *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437, that it

> "must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

and because as stated in *Gulf Refining Co.* v. *United States*, 269 U. S. 125, 135,

> "the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final."

II.

THE FEDERAL QUESTIONS RAISED BY THE PETITION FOR CERTIORARI WERE NOT PROPERLY PRESENTED IN THE RECORD

Respondent contends that the federal questions raised by the petition for certiorari were not properly presented in the record because no federal rights "specially set up or claimed" by petitioners under the Constitution or laws are shown to have been denied to them. Such a showing is essential under Sec. 237 (b) of the Judicial Code.

The statement in the motions for rehearing and to dismiss that the court below had no jurisdiction of the subject matter can hardly be said to constitute a federal right "specially set up or claimed" because it contains no reference to a provision of the Constitution or laws. While this court has held a question of the jurisdiction of a federal court may be raised at any time, that refers to entire absence of jurisdiction.

The federal questions were not properly presented in the trial court. They were waived in the court below unless it had no jurisdiction whatever and none of the questions properly raised in the court below were decided against petitioners. The burden of showing that this court has jurisdiction rests on petitioners, *Memphis Natural Gas Co.* v. *Beeler,* 315 U. S. 649, 651, and the rules require petitioners to specifically point out in the record the portions that confer jurisdiction on this court (Rule 12, para. 1). We will, therefore, discuss the foregoing points in connection with our consideration of petitioners' argument thereon under appropriate subheadings.

A. The Federal Questions Were Not Adequately Raised In the Trial Court

Petitioners assert (p. 22) the federal questions were adequately raised in the trial court under the principle "clear intendment." This principle is stated in *St. Louis Iron Mountain and Southern Ry. Co. v. Starbird*, 243 U. S. 592, 598, cited by petitioners (p. 22), but the following important requirement of the rule is not included in petitioners' quotation:

> "It is enough that it (the federal right) be relied upon and in a proper manner called to the attention of the court * * * *it is the right* * * * *which must be brought to the attention of the state court.*"

As stated in *Green Bay and Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67-68, cited by petitioners (p. 22), the federal right must be

> "*specially set up or claimed* in the state court in such manner as to bring it to the attention of that court."

Measured by the foregoing standards, petitioners did not adequately raise any federal question in the trial court. *Furthermore the questions which petitioners claim were raised related only to the jurisdiction of the Commission over the assignment of the license.* None of the pleadings can be construed to claim as stated by petitioners (p. 51) that the Commission had exclusive jurisdiction "over the transfer of the facilities" or that the court had no jurisdiction thereof. The public interest was not even mentioned in the questions presented in the petition for certiorari except as to primary jurisdiction which was not raised in the court below. Public interest has now been added to question 5. (Supra p. 4). Thus the only federal questions relied on by petitioners are not properly

presented. The issue of public interest, namely use of the station for propaganda purposes, was decided in petitioners favor (infra 7) and the "order" which the petitioners claim was nullified was a consent to the assignment of the license *and did not cover the transfer of the station* (Ex. 32, R. 661, 662A).

Petitioners refer (p. 20) to a motion filed by lessee and Gillin to strike a part of plaintiff's petition. This motion and the ruling thereon were not a part of the record in the court below or considered by it and are not now entitled to consideration (R. 785-791).

Nor did the answers filed by petitioners raise any other question. The answer of lessee and Gillin (R. 31) merely alleged that pursuant to the "orders" of the Commission on December 15, 1942, and January 12, 1943, the application for consent to assignment of the license was approved and the parties "directed to effectuate said assignment" and pursuant thereto the station had been transferred to lessee who has since been operating the station under the lease and orders of the Commission.

Neither of these "orders" directed the assignment of the license or the transfer or operation of the station (Ex. 32, R. 661, 662A, Ex. 34, R. 664). This answer did not even contain an allegation that the Commission had jurisdiction over the assignment of the license.

The answer of the other petitioners so far as related to any federal question merely alleged that the Commission

> "has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license . . . which jurisdiction was exercised in the approval of the transfer of said license" (R. 21).

Respondent admitted such jurisdiction of the Commission in his reply (R. 36).

Petitioners claim (p. 23) that the allegation as to the Commission's jurisdiction was subject to a further exception is unreasonable and not supported by the language used in the answer or the record which fails to show any order "to execute and perform the provisions of said lease by virtue of which possession of said leased property has now been delivered to the lessee" (R. 21). The so-called "order" was merely a consent to the assignment of the license (Ex. 32, R. 661, 662A).

None of the pleadings can possibly be construed to do more than allege that the Commission had jurisdiction over the *assignment of the license.*

The court below very properly held the question of the jurisdiction of the Commission over the assignment of the license "was eliminated from the case by the pleadings" (R. 798) *and no other federal right was mentioned in the pleadings.* Thus no "federal right specially set up or claimed" was denied to petitioners.

B. Some Jurisdictional Questions May Be Waived

Petitioners do not claim that any federal right was raised in the pleadings except as heretofore mentioned. They assert (p. 23) that the federal questions could not be waived since they involved jurisdiction over the subject matter. However, the federal questions to which petitioners refer relate *only* to the jurisdiction of the Commission over the assignment of the license. It is true that this court has held the question of the jurisdiction over a federal court may be raised at any time but this refers to utter lack of jurisdiction. As elsewhere shown

(p. 28) the state courts have all jurisdiction not relinquished to the federal government in the Constitution and the jurisdiction of the state and federal courts may be concurrent. An objection that the Commission or federal court had primary jurisdiction, if valid, was waived by failure to assert it in the trial court. Objection to a state court's jurisdiction because of exclusive federal jurisdiction is waived if not timely made. (Infra p. 47).

C. Questions Passed Upon by Court Below Are Not Properly Presented Unless Their Determination Was Necessary to the Decision Rendered

Petitioners assert (p. 24) that "all of the federal questions were explicitly raised" in the court below "by motions to dismiss and for rehearing, which motions were considered and decided on their merits." With two exceptions the only federal rights which were "claimed or set up" in the court below were that the Commission had exclusive jurisdiction over the assignment of the license and that the federal court had jurisdiction to review an order of the Commission. Petitioners there claimed in substance that neither court "ever acquired jurisdiction over the subject of this action" because the action was one to annul an order of the Commission made under the provisions of the Communications Act. However, the order referred to could only be the consent of December 15, 1942, to the assignment of the license (Ex. 32, R. 661, 662A). Thus the right "claimed or set up" was at most that the Commission and federal court had exclusive jurisdiction over the assignment of the license.

The two exceptions mentioned above are; first, the general claim that the court below did not have jurisdiction over the subject matter of the action which is discussed elsewhere (p. 47) and second, constitutional questions

which the court below properly refused to consider because not previously raised as required under Nebraska practice (R. 798). *Herndon* v. *Georgia*, 295 U. S. 441, 443.

The court below specifically recognized the jurisdiction of the Commission over the license but held such jurisdiction

> "does not deprive the state court of jurisdiction to hear and decide all other property rights in a radio station and the rights of the party incident thereto" (R. 797).

Since no federal right "specially set up or claimed" by petitioners has been denied, the only possible question is whether the court below had no jurisdiction whatever over the subject matter of the action, for which no reason was given in the court below.

Petitioners contend (pp. 28-29) that even though federal questions were not raised, they are now properly presented because the court below passed upon them. The rule mentioned by petitioners is subjected to a further qualification that a judgment may not be reviewed unless its decision on the federal question "was essential to the judgment rendered." *Montana* v. *Rice*, 204 U. S. 291, 299. *Lynch* v. *New York*, 293 U. S. 52, 54. The court below decided that the Commission had exclusive jurisdiction over the license and its assignment but that the state court had jurisdiction of the action to cancel the fraudulent lease. No other questions were "essential to the judgment rendered." Therefore, discussion of any other questions determined by the court below is unnecessary in determining whether a federal question was properly presented in the record.

III.

COMMUNICATIONS ACT DOES NOT EXCLUDE JURISDICTION OF STATE COURT OVER THIS ACTION

The only question which it can be seriously claimed has been properly raised and presented is that the court below did not have jurisdiction over the subject matter of this action. The basis for such a claim, namely, that the Communications Act grants exclusive jurisdicton to the Commission and federal courts, is unsound and contrary to the provision of the Act and well established principles of statutory construction. The Act clearly limits the jurisdiction of the Commission to matters relating to the proper operation of the station in the interest of the listening public and recognizes that its jurisdiction is not exclusive. The provisions of the Act requiring the consent of the Commission to an assignment of the license to operate the station cannot be reasonably extended to include a transfer of the station and its equipment. Nor can the Act be logically construed to require a controversy of this nature to be determined only by the Commission. Such an extension of the jurisdiction of the Commission is quite unnecessary to accomplish the purpose of the Act, that is the regulation of broadcasting. Such purpose can be accomplished by licensing the *operation* of stations more effectively than by licensing the ownership or possession of stations. In any event Congress chose the former method and the responsibility for changing it rests with Congress, not the court.

We believe it will be helpful to consider the jurisdiction of the state courts under the United States Constitution and then, by analyzing the Communications Act, endeavor

to demonstrate that a reasonable construction does not exclude the state court from jurisdiction over this action. These points will now be discussed under appropriate sub-headings.

A. Jurisdiction of the State Court

It is well established that the states have all judicial powers not surrendered by them to the United States in its Constitution. *Tennessee* v. *Davis*, 100 U. S. 257. The jurisdiction thus conferred by the Constitution should be confined to the precise limits of the statutes enacted thereunder. In *Healy* v. *Ratta*, 292 U. S. 263, 270, it is said:

> "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. See *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 233, 234. *Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.*"

The general jurisdiction of the state courts over a fraud action of this character (eliminating for the moment the provisions of the Communications Act) is established by the decision of the court below and by the Nebraska Constitution, laws, and decisions, and we assume it will not be questioned. The decision of the state court that it has jurisdiction should be accepted by this court unless it determines that such jurisdiction is excluded by the Communications Act. *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 477.

The jurisdiction conferred by an Act of Congress on the federal court is not necessarily exclusive. It is for

Congress to determine whether jurisdiction of the federal courts shall be exclusive or concurrent of controversies arising under the laws of the United States. *Bowles* v. *Willingham*, 321 U. S. 512.

In discussing the extent to which federal legislation limits the jurisdiction of a state in the same field, it is said in *Kelly* v. *Washington*, 302 U. S. 1, 10:

> "And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced."

Nor is exclusive jurisdiction conferred unless such an intention is "*manifested by clear language.*" *Plaquemines* v. *Henderson*, 170 U. S. 511, 517.

This apparent reluctance to extend the exclusive jurisdiction of federal courts may be due to the fact that it is the duty of the state courts to enforce rights secured by the Federal Constitution and laws. In *United States* v. *Bank of New York and Trust Co.*, 296 U. S. 463, 479, it is said:

> "It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive (citing many cases) . . . . Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them. *Robb* v. *Connolly*, 111 U. S. 624, 637."

Unless Congress confers exclusive jurisdiction on the federal courts, its jurisdiction is merely concurrent with the state courts and the commerce clause of the Constitution has been construed to give the federal courts *concurrent rather than exclusive jurisdiction.*

In *Grubb* v. *Public Utilities Commission,* 281 U. S. 470, 476, it is said:

> "The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. *This view of that clause is quite inadmissible.* It has no support in any quarter, is at variance with the actual practice in this class of litigation. (citing many cases) • • • and is in conflict with the doctrine often sustained by this court that *the state and federal courts have concurrent jurisdiction of suits of a civil nature arising under the Constitution and laws of the United States, save in exceptional instances where the jurisdiction has been restricted by Congress to the federal courts* • • • (citing many cases.)"

If the state and federal courts have concurrent jurisdiction, then the principle of comity is applicable and supports the jurisdiction of the state court. In *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118, 135, the court quotes with approval from *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 235, as follows:

> "The rank and authority of the (federal and state) courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a

court of the other jurisdiction is a rule of right and of law based upon necessity, • • •

"*The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process.* The reciprocal doctrine of the res cases is but an application of the reason underlying the Act."

Guided by the foregoing well established rules related to the jurisdiction of the state court, we will consider under appropriate headings, the construction of the Act.

B. The Communications Act When Reasonably Construed Does Not Give the Commission or Federal Courts Jurisdiction Over This Action

When the Communications Act is given a reasonable, logical, and realistic construction, it does not grant to the Commission or the federal courts exclusive jurisdiction over this action and unless it clearly excludes the jurisdiction of the state court over the cancellation of the fraudulent station's lease, the respondent is entitled to have the petition for certiorari dismissed or the judgment of the court below affirmed.

The Act when reasonably construed does not give the Commission and federal courts exclusive jurisdiction of this action for (1) it shows it was not so intended, (2) it does not contain words which can be so construed, (3) it recognizes non-exclusive jurisdiction, (4) exclusive jurisdiction is not necessary to accomplish its regulatory purpose, (5) administrative construction is non-exclusive jurisdiction, (6) it does not contain adequate provision for determining actions of this character, (7) it would establish an undesirable precedent. These points will now be discussed separately.

1. The Act Shows It Was Not Intended to Give the Commission Exclusive Jurisdiction

The primary purpose of the Communications Act as stated in Section 1 is to regulate radio "so as to make (it) available so far as possible to all the people of the United States." The "public interest" is also the standard governing the transfer of licenses because section 310 (b) of the Act provides in substance that a license shall not be transferred unless the Commission shall "decide that said transfer is in the 'public interest'." The words "public interest" has been described by this court in *National Broadcasting Co. v. United States*, 319 U. S. 190, 216 as "the interest of the listening public in 'the larger and more effective use of radio'."

It clearly appears from the Communications Act and cases construing its provisions that the act was intended to provide an administrative agency charged only with supervision of radio facilities to the end that the interest of the listening public be promoted by securing the best possible broadcasting service. No such question is involved in the present case for the competent staff that operated the station for the Society was transferred with the station to the lessee and continued its operation (Ex. 29, R. 375, 376, 397).

It, therefore, appears that the Communications Act was not intended to give the Commission jurisdiction to determine whether the lease of this station was procured by fraud for such an action does not involve the "public interest" as those words are used in the Communications Act.

2. THE ACT DOES NOT CONTAIN WORDS WHICH CAN BE CONSTRUED TO GIVE EXCLUSIVE JURISDICTION

The Communications Act does not contain words specifically giving the Commission jurisdiction of an action of this character nor does it contain general words which could be properly construed to give the Commission such jurisdiction. *Its language clearly limits the jurisdiction of the Commission to questions involving the proper operation of stations in the public interest.* The provisions of Section 310 relating to a transfer of a station license is clear and unambiguous. It states:

> "(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred * * * unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

It mentions the station license, the frequency and the rights herein, but it does not mention the station or its equipment, nor is any language used which can be reasonably construed to cover a station or its equipment. Neither in specific nor general language does it give to this Commission jurisdiction to determine a question as to whether the transfer of the station and its equipment was made under a lease secured by fraud on the lessor.

If Congress had intended to require the consent of the Commission to a transfer of a station or its equipment, it would have been very simple for it to have inserted in Section 310 (b) quoted above after the word "granted" the words "the station and its equipment." The fact that words of the character mentioned were not included indicates a clear intention that the transfer of a station

and its equipment should not require the consent of the Commission. To read into the Act, particularly Section 310 (b), words covering the station and its equipment, would be unjustified and contrary to the well recognized rule that where the words of a statute are plain the court will not add to or alter them. *Matson Navigation Company* v. *United States*, 284 U. S. 352, 356.

The words used in the act so far as material to this case are ordinary ones and should be given their ordinary meaning. As the court said in *Federal Communications Commission* v. *Associated Broadcasters*, 311 U. S. 132, "Primarily our task is to read what Congress has written." "We are not at liberty to construe language so plain as to need no construction." *Helvering* v. *City Bank Farmers Trust*, 296 U. S. 85, 89.

The words "station license" clearly means a license to *operate* a station. We do not find any place in the Act where the word "license" can be reasonably construed to include a station and its equipment. The words "license" and "station" are repeatedly used, not interchangeably, but showing that they cover different subjects. A licensee "means the holder of a radio station license" (Sec. 3 (c)), and a station "means a station equipped to engage in radio communication" • • • (Sec. 3 (k)). Likewise, station equipment is referred to as "instrumentalities, facilities, apparatus," • • • (Sec. 3 (b)).

Congress was obviously concerned about the character of equipment installed in a station, and its operation, but not with its ownership or a controversy not affecting its proper operation. The Act has been thus construed in *Southern Broadcasting Co.* v. *Carlson*, 187 La. 823, 175 So. 587, where it was held that the Act was not intended

to place settlement of disputes of a personal or private nature by the individuals in the Commission.

Congress evidently believed regulation of broadcasting could be accomplished by control over the *operation* of the stations. This control is exercised through licenses to operate the stations. In *Federal Communications Commission* v. *Sanders Brothers*, 309 U. S. 470, 474, it is said:

> "The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the *use* of radio frequencies by prohibiting such *use* except under license."

Thus the court recognized regulation is accomplished through licensing the *use* of stations rather than licensing the *ownership* of stations. Such regulation appears adequate for a station can not be used without a license. No sound reason for licensing the ownership of a station exists.

Congress apparently felt that control of the use of stations by licenses was adequate and perhaps realized an attempt to license the ownership of stations might be unconstitutional and jeopardize the entire Act. It is a well recognized rule "that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 390. *Lewellyn* v. *Fick*, 268 U. S. 238, 251. *Lucas* v. *Alexander*, 279 U. S. 573, 577.

The regulation of radio broadcasting is exercised under the commerce power. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, and jurisdiction of state court should not be displaced unless such an intent clearly appears. In *Mauer* v. *Hamilton*, 309 U. S. 598, 614, this rule is stated as follows:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred *unless clearly indicated* by those considerations which are persuasive of the statutory purpose."

Applying the foregoing rules to the language used in the act shows clearly that it should not be construed to give the Commission exclusive jurisdiction over the transfer of a station or exclusive jurisdiction of this action to cancel a fraudulent station lease.

3. The Act Recognizes That the Commission Does Not Have Exclusive Jurisdiction.

Not only does the Communications Act contain no provision giving the Commission jurisdiction over an action of this character, but on the contrary it carefully preserves the existing remedies under the common law or by statute. Section 414 provided:

> "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this Act are in addition to such remedies."

Petitioners' attempt (pp. 74-75) to brush aside section 414 because it was not in the Radio Act of 1927 and assert it has no application to the present case. It must have been included in the Act of 1934 for some purpose. The words used are not ambiguous and a reasonable interpretation would be a recognition of existing common law remedies such as the right of a state court to pass upon a question of fraud in connection with a lease of a station.

This court has recognized that the Communications Act does not give the Commission unlimited power over radio

stations. In *Federal Communications Commission* v. *Nelson Bros.*, 289 U. S. 266, 285, it is said:

> "In granting licenses the Commission is required to act 'as public convenience, interest and necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power."

It would appear that the right of respondent to have the courts of Nebraska decide whether the lease should be cancelled because of fraud was not taken away by the Communications Act but was, in fact, recognized and preserved by the Act.

4. No Sound Reason Exists for Giving the Commission Exclusive Jurisdiction

There does not appear to be any sound reason for giving the Commission jurisdiction, and certainly not exclusive jurisdiction, over the transfer of a radio station. The Communications Act limits the jurisdiction of the Commission to matters relating to the *operation* of stations in the public interest. Controversies which do not involve the proper operation of a station do not affect the public interest and so the Commission was not given jurisdiction of such controversies.

What logical basis is there for giving the Commission jurisdiction over an action for the cancellation of a station lease where no question as to the proper operation of the station is involved? What difference could it make to the public whether the lessor is receiving an adequate or inadequate rent? That is a question of private rights over which the Commission has no jurisdiction or concern.

The Commission so held in The Matter of Selma Seitz, 7 F. C. C. 315, 318, where in connection with transfer of a license the Commission said:

"The contract price here presented is not commensurate with the actual values of the intangibles and intangibles to be transferred. In this connection, we doubt seriously whether there is any item of a tangible nature here listed to which a value may reasonably be attached. However, our primary consideration from the standpoint of the public interest, deals not with the prevailing relationship between contract price and the items to be transferred, but rather with the qualifications of the proposed transferees and their abiltiy to provide the public with an improved broadcasting service" (citing other similar holdings).

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, the court in recognizing that the purpose of the Communications Act was to solve administrative problems rather than conflicting private rights said:

"The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."

Later (p. 141) the court refers to the Commission as an "administrative agency." Whether the lease was fraudulently procured from lessor involves "the adjudication of conflicting private rights," and is entitled to a judicial rather than administrative determination.

As elsewhere shown (p. 35) the Act was passed to regulate broadcastng and this was accomplished through licensing the *operation* of the stations. Such regulation is completely effective without control over the possession, ownership, or transfer of stations. Therefore, no sound reasons exist for reading into the Act words to give the Commission jurisdiction over the transfer of station,

and certainly not words to give it exclusive jurisdiction to determine whether such transfer was procured through fraud on the lessor.

5. The Act Has Been Construed by the Commission Not to Give it Exclusive Jurisdiction

In resolving doubt as to the proper construction of a law administrative construction is entitled to consideration, *Mintz* v. *Baldwin*, 289 U. S. 346, 351. The record in this case shows affirmatively that the Commission concedes it has no jurisdiction over the subject matter of this action except over the transfer of the license (Supra p. 23).

Furthermore, it was specifically recognized by the Society and lessee when they petitioned the Commission to extend its consent to the assignment of the license until "the rights of the parties should be fully adjudged in said action" (Ex. 33, R. 665, 669). The reference, was of course, to the present action. Also, in other proceedings, the Commission has recognized that it does not have jurisdiction over similar questions.

In a situation almost identical with the present case, the Commission held that a state court had exclusive jurisdiction to decide whether a sale of a station and its facilities should be rescinded because of "fraud, duress, conspiracy, and undue influence" and it refused the plaintiff's application for leave to intervene in order to request the Commission to defer action on defendant's application for consent to the assignment of the license to a third party. The proceeding "In Re Application for Consent to the Assignment of License to Station WMCA" is referred to by petitioners (p. 69, note 29). In its opinion the Commission says:

"As a legal matter, however, petitioner's argument misconceives the respective jurisictions of the Court and this Commission. On the ~~other~~ one hand, *the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of station WMCA. The Commission has no power to act with respect to these matters* and any action it takes in the present proceedings will not affect the Court's jurisdiction."

The Commission did just what the court did in the present case —that is, held that the Commission had jurisdiction of the license and the court jurisdiction over the validity of the transfer of the station and its equipment. Except for the so-called "power issue" the interest of the listening public was just as much involved in the continued proper operation of the station, for if the sale were rescinded plaintiff would be entitled to the possession of the station and its equipment. This construction of the action by the Commission which is just the same as the courts below is entitled to serious consideration. Mr. Fly was then chairman of the Commission and the decision appears to have been unanimous.

6. The Act Does Not Contain Adequate Provisions for Determining This Action

Another reason why it appears that the Communications Act was not intended to give the Commission jurisdiction over an action of this character is the lack of an adequate provision for the determination of such a controversy. There is "no statutory preparation for the organization of such machinery." *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 392. Nor has

the Commission under its rule-making power promulgated any rules which provide for such determination.

The Commission is recognized as an administrative agency rather than a part of the judicial branch of the Government. An action to declare void and to cancel a lease because it has been procured by fraud should be entitled to consideration by a court qualified and experienced in determining the important legal questions involved. The absence of adequate provisions in the Act for judicial disposition of such an action indicates that the Commission was not intended to have jurisdiction thereof.

Petitioners suggest (p. 78) that respondent "should have submitted his public interest questions to the Commission for its expert consideration, and if dissatisfied with its action * * * appealed to the federal court, pursuant to section 402 (a)." Respondent would not be entitled to appeal from the Commission's consent to the assignment of the license. (Infra p. 53). But even if he were, he would not be entitled to a trial *de novo* but only a review limited to determining whether errors of law were committed by the Commission. *Scripps Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 10. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227. Thus, respondent would be deprived of a judicial trial on the important question of fraud in the procurement of the lease. Such a harsh result should not be imposed on the respondent, certainly not in the absence of a crystal clear requirement therefor in the Communications Act.

If Congress had intended to require the Commission to hear and determine a controversy of this character involving questions of local law and to review such determina-

tion by a three-judge federal court, it would surely have included appropriate provision therefor. The specific duties given to the Commission by the Act are a sufficient responsibility without extension thereof to causes of this character by a tenuous construction of the Act. The absence of such provisions is a clear indication that Congress did not intend to give the Commission that jurisdiction.

7. Giving the Commission Exclusive Jurisdiction Would Establish an Undesirable Precedent

If petitioners' contention that the Commission has exclusive jurisdiction is accepted, it would require the following actions to be litigated before the Commission rather than in the state courts:

> 1. An action by lessee to require lessor to transfer the station and equipment to lessee or to cancel the lease because of some fraudulent misrepresentation of the lessor.
>
> 2. An action by lessor to require lessee to comply with the various provisions of the lease (R. 21), such as maintaining the leased property in first class condition and installing new equipment as provided in paragraph 4; keeping the property insured and replaced as provided in paragraph 5, delivering possession to lessor at end of lease as provided in paragraph 6, or on termination of lease because of default as provided in paragraph 8, or defaults mentioned in paragraph 12, or because of termination of lease as mentioned in paragraphs 13 and 14.

Likewise actions affecting the operation of the station by lessee could arise in controversies with the lessor over the lease of the space occupied by the station or with third parties who might claim a right to the leased property

under a prior lease or sales agreement with lessor or as purchaser of a part or all of the property at a sale under an execution against lessee. Determination of the actions mentioned above would probably affect the operation of the station by lessee, yet it is apparent that no sound basis exists for contending that the Commission would have exclusive jurisdiction of all such actions and such a decision would establish an undesirable precedent of requiring the Commission and three-judge federal courts to determine a great variety of controversies which should properly be determined by the state courts.

We believe the foregoing is a fair analysis of the Act and that to construe it to give the Commission and federal courts exclusive jurisdiction of this action would be unreasonable and contrary to fundamental principles relating to the division of judicial authority between the state and national governments.

IV.

THE STATE COURT HAD JURISDICTION OF THE ACTION AND PETITIONERS ASSENTED THERETO

The question of fraud in procuring the lease is certainly one that is within the general jurisdiction of the state court. The petitioners, having asked both courts below to determine the question of fraud in connection with the lease, have no right, after an adverse decision, to question its jurisdiction as they have done. This will be discussed further under appropriate sub-headings.

A. The Primary Jurisdiction Doctrine Did Not Deprive the Court Below of Jurisdiction

Petitioners assert (p. 77) that the primary jurisdiction doctrine gives the Commission jurisdiction. We do not

believe this question is properly before this court because it was not raised in the courts below. In any event the doctrine is not applicable. Administrative agencies have primary jurisdiction only of matters committed to them by statute which are ordinarily problems of administration such as regulation of rates and operations. In *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139, in discussing the application of the primary jurisdiction doctrine the court said:

> "Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

No question calling for "technical knowledge" in involved in the present case. The qualifications of the lessee to properly operate the station are not questioned.

As heretofore stated, we do not believe the Commission ever had jurisdiction of the controversy over the cancellation of the station lease but even if it had primary jurisdiction thereof, it cannot now be successfully urged by petitioners. The doctrine does not hold that the administrative agency has *exclusive* jurisdiction, but only *primary* jurisdiction. The cases cited by petitioners (p. 77) are ones which required technical knowledge on a question which has been exclusively committed by statute to an administrative agency and therefore have no application to this case.

Even if the Commission had primary jurisdiction, the court below also had jurisdiction. The petitioners not only failed to make a timely claim that the Commission had primary jurisdiction but, in fact, the Commission was requested to extend the time of its consent to the assignment of the license until final adjudication of this very

action (Ex. 33, R. 665, 669). Petitioners assert that jurisdiction of the court over the subject matter cannot be waived, but no authority is cited that the right to have a controversy determined by the tribunal having primary jurisdiction cannot be waived by requesting a decision by a court that also has jurisdiction. The failure of the petitioners to have made a timely claim that the Commission had primary jurisdiction would seem to constitute a waiver of any such claim.

B. The Fact That the License is Incidentally Involved Did Not Deprive the Court of Jurisdiction

Petitioners asserted (p. 35) that the Commission has exclusive jurisdiction of all matters involved in this action because the license to operate the station was issued by the Commission under the authority of the Communications Act and its transfer is involved. The fallacy of petitioners' position is shown by decisions of this court in cases involving patents. The statute vests exclusive jurisdiction in the federal courts "of all cases arising under the patent rights or copyright law of the United States." Notwithstanding this grant of exclusive jurisdiction it has been uniformly held that state courts have jurisdiction of actions involving rights arising under a patent.

In *Pratt* v. *Paris Co.*, 168 U. S. 255, 259, the court held that evidence of the invalidity of a patent and its infringement of a prior patent would not oust the jurisdiction of a state court in an ordinary action of assumpsit, the question of the invalidity of the patent being incidental to a defense of the lack of consideration and of a rescission of the contract. The court further held that the power of state courts to determine questions arising under the

patent laws *is not precluded by the federal statute excluding them from jurisdiction of cases arising under those laws. On this subject the court said:*

> "the state court had jurisdiction both of the parties and the subject-matter, as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of the defenses, the defendant claimed the invalidity of a certain patent."

See also *Luckett* v. *Delpark*, 270 U. S. 496, 502; *Gulby* v. *First National Bank*, 299 U. S. 109.

In *Becher* v. *Contoure Laboratories*, 279 U. S. 388, 391, jurisdiction of a state court to establish a trust ex maleficio in letters patent was involved. In upholding the jurisdiction of the state court, Justice Holmes made this pertinent statement:

> "That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that, if it is true, an important patent is void."

The foregoing language is by analogy applicable to the present case for the requirement of the Communications Act that the license cannot be transferred without the consent of the Commission "*does not give sacrosanctity to facts that may be conclusive upon the question in issue.*" In other words, the fact that Commission's consent is necessary to an assignment of the license does not prevent the state court from determining that under the facts proven the lease was fraudulent and void.

C. Petitioners Cannot Question the Jurisdiction of the Court After Assenting Thereto

As elsewhere shown the petitioners did not at any time object to the jurisdiction of the court to pass upon the validity of the station lease until in their motions for rehearing in the court below. In fact they asked both the trial court and the court below to decide the case on its merits. Under those circumstances they should not be permitted to now assert that the court below was entirely without jurisdiction. Even where a statute confers exclusive jurisdiction on a federal tribunal if objection is not made to the jurisdiction of a state court, its judgment will be upheld.

In *Mays* v. *Fritton*, 87 U. S. 414, 418, the claim to the proceeds of the sale in state court of a bankrupt's property was involved. In holding that the objection to the jurisdiction of the court was too late unless made in the court below before its decision was rendered, the court said:

> "The present was the case of the foreclosure of a mortgage under the state laws. The disposition of any surplus that might arise from the sale on such mortgage, under a proceeding in the state courts, *prima facie belonged to the state courts. The subject-matter was within their jurisdiction, and under their control. If special circumstances existed which altered that result, it was the duty of the party making such claim to state them and ask a ruling accordingly.* Nothing of the kind was done in the present instance.
>
> "To be available here an objection must have been taken in the court below. Unless so taken it will not be *heard here. It is not competent to a party to assent to a proceeding in the court below, take his chances of success and, upon failure, come here and object that the court below had no authority to take*

the proceeding. This point comes before us at every term and is always decided the same way." (citing many cases.)

The foregoing case was cited with approval and followed in *Winchester* v. *Heiskell*, 119 U. S. 450.

It would, therefore, appear under the foregoing authorities that petitioners, having raised no question as to the jurisdiction of either the trial court or the court below until after its judgment but took their chances on success, should not now be permitted to raise that question.

A somewhat analogous situation existed in *Tucker* v. *Alexander*, 275 U. S. 227, 231, where an action to recover taxes alleged to have been illegally exacted was commenced without presenting a proper claim for refund as required by a statutory provision and regulation of the Treasury Department. This court held that since "during the entire course of the trial, no question was raised as to the sufficiency of the claim for refund," objection thereto could not be made on appeal.

Likewise in the present case if the petitioners or Commission had any basis for claiming that the trial court did not have jurisdiction to determine the validity of the station lease because it had not been presented to the Commission, it was waived by their failure to assert it. Furthermore, the lessor and lessee specifically requested the Commission to extend the time it had given for the assignment of the license until the validity of the lease could be determined in this action. The Commission, after consideration of the application, entered an order denying it (Ex. 33, R. 665, 669, Ex. 34, R. 664). Certainly this constituted a waiver by lessor and lessee of any requirement that the consent of the Commission should be secured before the lease could be cancelled. Likewise the Commission by not taking any affirmative action by inter-

vention or otherwise when the pendency of this case was specifically called to its attention, in effect waived any requirement that its consent to the cancellation of the lease be obtained and gave its approval to the determination by the state court of the validity of the station lease.

V.

THE JUDGMENT BELOW DOES NOT INVADE THE JURISDICTION OF THE COMMISSION

Petitioners contend (pp. 30-78) that the judgment below invades the jurisdiction of the Commission by nullifying its "order authorizing operation of the station by lessee in the public interest" and "by deciding administrative questions with respect to the transfer of the operation" of such stations. Even if it be assumed that these points are properly presented, they are not supported by the facts.

The only issue which in any way involved the public interest, namely: use of the station for propaganda purposes, was decided in petitioners' favor in both courts below and petitioners are not in position to complain of such decision. Nor is there any merit to the claim that this is an action to nullify an "order" for it was merely a consent to the assignment of the license and was only incidentally involved. Neither of these points should be considered because they were not raised until after the judgment of the court below. We will briefly answer petitioners' argument on these points under appropriate subheadings.

A. The Judgment Below Does Not Nullify an Order of the Commission

Petitioners assert (pp. 66 and 78) the judgment nullified an order of the Commission and therefore the court

had no jurisdiction because review of such an order is limited to a three-judge court under Sec. 402 (a). Petitioners' argument is unsound for the "order" related only to an assignment of the license and not to a transfer of the station. It was recognized by all parties and by the court below that the court did not have jurisdiction over the transfer of the license. Furthermore the court below specifically held:

> "The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit * * * and, in addition thereto it was eliminated from the case by the pleadings they filed in their own behalf" (R. 798).

Its decision on this question is correct and should be accepted by this court. *General Trading Co. v. State Tax Commission of Iowa*, 322 U. S. . . ., 88 L. Ed. Ad. Op. 914, 915.

The license has not been cancelled but is still outstanding and it is to be assumed that the Commission will consent to its assignment back to the Society or issue a new license to the Society when application is made therefor.

No order was entered by the Commission relating to the transfer of either the license or the station and none was requested. The Commission merely gave its consent to the assignment of the license. It is described in the heading and five times in the body of the instrument as a "consent." The word "order" does not at any time appear in it nor is it in substance an order. It expressly provides:

> "The actual assignment of the station license * * * shall be completed within 30 days from date hereof; *otherwise this consent shall be void and of no effect.*"

It merely provides that if the assignment was not made within the thirty days the consent became "void and of no effect." There was no requirement express or implied that the assignment be made. The Society and lessee could have waited until the "final adjudication of this action" as mentioned in their application (Ex. 33, R. 665, 669) and then made a new application for consent to the assignment or they could have appealed from the Commission's order but instead of doing either they took their chances on the outcome of this action. If they are unhappy about this situation, they have only themselves to blame.

Petitioners (p. 67) have cited *Venner v. Michigan Central R. R. Co.*, 271 U. S. 127, to support their claim that the court below did not have authority to vacate an order of the Commission. As heretofore shown, the Commission did not order the transfer of the license, but merely consented to such transfer. The foregoing case is distinguishable from the present case in many respects. In that case the court found "that the suit was essentially one to annul or set aside an order of the Interstate Commerce Commission" authorizing and approving the issuance of bonds in payment for equipment. The *statute gave the Commission exclusive jurisdiction of questions involving the issuance of bonds.* In the present case there was no order to vacate and the Commission never authorized or approved the leasing of the station. Its consent to the transfer of the license was only an incidental matter, and the Communications Act gives the Commission no jurisdiction to determine the validity of the station lease, which was the main issue in the present case. In *Central New England Ry. Co. v. Boston and Albany R. R. Co.*, 279 U. S. 415, 420, the Venner case is distinguished so far as the present case is concerned.

Other cases cited by petitioners relating to the Interstate Commerce Commission are cases involving orders made directly affecting questions which under the law were within the exclusive jurisdiction of the Commission.

Petitioners assert (p. 35) that the Commission's consent to the assignment of a license includes approval of the transfer of the station. In fact, they state that "the jurisdiction of the Commission to issue licenses, approve transfers of radio stations and otherwise determine matters of public interest must be jealously safeguarded." They have not and can not point out any provision of the Communications Act justifying the statement that the Commission has jurisdiction to "approve transfer of radio stations." They merely assume that fact and then base their argument on that assumption. They constantly refer to the expert knowledge of the Commission but that relates to the equipment and operation of a station. *It does not require any expert knowledge of radio to determine whether a station lease was procured by fraud.*

In a further effort to support their claim that the license includes the station they criticize the court below (p. 36) for treating the license of the station separately and insist that jurisdiction of the Commission over the assignment of the license included jurisdiction over the transfer of the station.

We believe we have shown that the court below was entirely justified in treating the license and station separately. In any event, it was the petitioners who are responsible for such separate treatment. They specifically alleged that the Commission "has and conceded that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of license to operate said radio station" (R. 21). This alle-

gation was not denied by anyone and was specifically admitted by respondent in his reply (R. 36). The court below held exactly as petitioners had contended, namely, that the Commission had jurisdiction over the assignment of the license and the state court had jurisdiction over the station and the lease thereof (R. 797-8). Furthermore, the Society and lessee asked the Commission to extend the time named in its consent to the assignment of the license "until final adjudication of the (this) action" (Ex. 33, R. 665, 669. As we have elsewhere shown (p. 34), the Communications Act does not justify the claim that a license to operate a station also includes ownership or possession of a station. Throughout the Act the words "license" and "station" are given a separate meaning. Clearly the judgment of the court below did not nullify an order of the Commission.

B. Respondent Could Not Have Maintained a Suit Under Sec. 402 (a)

Petitioners assert (p. 78) that respondent should have intervened before the Commission and then if dissatisfied sought a review under Section 402 (a). It is doubtful if respondent could have intervened because his objections to the transfer of the station were based on fraud on the membership of the Society in the making of the lease which was not a question of interest to the listening public. But even if allowed to intervene and we assume that the Commission's consent was an "order," still respondent could not have maintained a suit under the provisions of Section 402 (a). Such is the holding in *Pittsburgh and West Virginia Ry. Co.*, 281 U. S. 479, 487, which held that a minority "stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order," such order

being one entered by the Interstate Commerce Commission for the abandonment of a railroad station. None of the cases cited by petitioners appear on careful examination to hold otherwise.

Petitioners also imply that respondent should have intervened in the request made to the Commission to extend the time for assigning the license. No sound reason existed for respondent to intervene. This action was then pending involving the validity of the lease and the respondent as well as the petitioners recognized that the state court had jurisdiction to determine that question.

Since respondent could not have maintained a suit to review the consent of the Commission to the assignment of the license even if it be assumed that it was an order for the transfer of the station as well as the license, it seems clear that the Act cannot be construed to give the Commission excluive jurisdiction to determine whether the lease was fraudulent.

C. The Public Interest Was Not Involved

Petitioners discuss (pp. 40-65) the pleadings, the trial and the opinion of the court below in a detailed but unsuccessful effort to support their claim that the public interest was involved. No such interest was involved other than the use of the station for propaganda purposes which was decided in petitioners' favor by both courts below. It is significant that no objection was made by petitioners to the courts below deciding any question of public interest and they were quite willing to accept a decision thereon providing it was in their favor.

We do not believe it necessary or proper to discuss the evidence on this point for the decision of the court below should be accepted thereon and so far as the plead-

ings and opinions are involved they speak for themselves. *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. ..., 88 L. Ed. Adv. Op. 914, 915. However, because of some statements of the petitioners which reflect on the court below as well as the respondent, we will consider them briefly.

Petitioners' discussion of the trial (p. 43) is substantially limited to the statement that respondent did not appear at the trial. This fact is wholly immaterial but the court should have the facts. The record shows there was no reason for him to appear for all facts to which he could have testified in support of the allegations of his petition, and not admitted in the answers, were proven by depositions. Dr. Johnson very properly devoted his time to caring for his patients instead of attending the trial.

Petitioners (pp. 44-60) discuss the opinion of the court below. The statement of petitioners (p. 47) that the court found that there was no plan of the Society's directors "to procure for themselves, their friends or associates control of the radio station" is not correct. The court specifically found that the directors left the disposition of the station to President Bradshaw (R. 752) who "prompted the organization of lessee by his friends and those of Gillin in order to take over the station" (R. 760). Thus the station passed into the control of Bradshaw's friends for a grossly inadequate consideration. The plan was similar to one followed by the Society's officers including Bradshaw when a number of years previously they diverted $2,000,000 of the Society's assets to a company controlled by their friends. The court held it was a fraudulent transaction and required them to return the money to the Society (R. 364). See *Folts* v. *Globe Life Insurance Co., et al*, 117 Neb. 723, 223 N. W. 797.

Petitioners sarcastically refer (p. 44) to the court's conclusion that the lease rental is inadequate and state the court "substituted its own judgment for that of all witnesses." This is directly contrary to the record for three of *petitioners'* witnesses on cross-examination testified that from the standpoint of the Society the lease rental should be "higher" (Ryan, R. 587), should be "nearly double" (Cowles, R. 617), and should be "a great deal more—maybe twice more" (Hough, R. 642). Also petitioners (p. 45) sarcastically refer to the court's "cavalier treatment" of the "public power issue." But strange as it may seem, petitioners criticize the court for deciding according to their contention.

Petitioners (pp. 49 and 76) imply that the court below was opposed to Gillin's continued management and substantial interest in the lessee which had been approved by the Commission. This is a distortion of the opinion for it does not object to Gillin's continued management or to his interest in the lessee but it does very properly question the propriety of his receiving in connection with the lease "a one-fourth interest in this 15-year lease on this valuable radio station for a nominal investment and in addition thereto, in effect, a $25,000 bonus from the Society" (R. 760). Those facts did not appear in the application to the Commission.

Petitioners (pp. 50 and 76) criticize the court for its attitude concerning the financial condition of the lessee and state it relied on the same financial data as contained in the application to the Commission. Petitioners fail to recognize that the court below and the Commission were considering such data from different viewpoints, the Commission merely to determine whether the lessee appeared to be qualified to operate the station while the court was

interested in determining whether the lease was fraudulent. Petitioners (pp. 52 and 60) mention the cost of the property but the record cited does not support their statement. Reference to the cost is merely a part of a hypothetical question and not an answer (R. 781).

Petitioners imply (p. 60) that the court below treated the license as a property right but that is directly contrary to the record for the court below says:

> "Such a license is a permissive grant of a privilege and creates no vested property rights in the licensee" (R. 797).

In discussing the decree, petitioners (p. 61) assert that the court "arrogated to itself the Commission's function of determining whether a particular broadcast should be carried on, and if so, by whom." That is certainly an unjustified characterization of the court's determination that the station lease was fraudulently procured.

The statement (pp. 61, 62) that the original license assigned to the lessee expired in 1943 and that new licenses have been issued is not supported by the record. The application for consent to the assignment states that the license expires "6-1-44." (Ex. 29, R. 375, 385). Petitioners refer to new licenses and the appendix contains copies but their source is not disclosed. They were not in the record in the court below and there does not appear to be authority for thus presenting further evidence.

The statement (p. 62) that the judgment "immediately vitiates the existing license," is not correct for it is still effective and can be assigned to the Society without interruption in the operation of the station. No doubt the court had in mind the filing of an application for consent to the assignment when it ordered "that generally everything be done to restore the parties to their original position" (R. 761).

The dilemma which petitioners mention (p. 64) is purely imaginary for the Commission can still exercise necessary control over the operation of the station by withholding consent to the assignment of the license to anyone not properly qualified. There is no reason to believe that the Commission would not permit the Society to again resume operation or to transfer the license to any other qualified operator to whom the station and equipment is transferred.

It is proper to assume that the Commission will fulfill its duty of seeing that broadcasting is continued by this station and that it will therefore consent to the transfer of the license to the Society or to any qualified operator to whom the station is transferred. A refusal by the Commission to give such consent would countenance and further the fraud of the petitioners in their effort to deprive the Society of the use of its station. The comity which exists between the state and federal governments should assure the cooperation of the Commission in the continued operation of this station.

Many cases are cited by petitioners (pp. 65-78). The principles involved in those cases so far as applicable to the present case have heretofore been discussed by us and it does not appear that petitioners have cited any authority which would justify this court in holding that the court below did not have jurisdiction to determine whether the station lease was fraudulently procured, particularly in view of the fact that petitioners assented to the jurisdiction until after an adverse decision in the court below. Despite the many general statements of petitioners, they have failed to point out any actual question of interest to the listening public other than the use of the station for propaganda purposes, which was decided in their favor.

Petitioners' expression of fear (p. 76) concerning future tranfer of stations in Nebraska depends on the validity of the transfers. If a station is fraudulently leased or sold, the courts of Nebraska may be expected to properly protect the owner of the station, and in such a way as to not conflict with the Commission's proper function.

Summarized, petitioners' contention is that the listening public will be better served by lessee's operation of the station under its fraudulent lease and the Commission will help the lessee to accomplish that wrongful purpose. It is unsupported by the record and is an unjustified reflection on the Commission's performance of its duty.

CONCLUSION

No sound reason appears why the Communications Act should be construed to give the Commission exclusive jurisdiction over this action and to hold that the court below was without jurisdiction to cancel the lease. Petitioners asked both courts below to decide the case on its merits and after an adverse decision they should not be premitted to question the courts' jurisdiction on the unjustified basis that the public interest would be better served by lessee's operation of the station. The only members of the public who would thus benefit are the lessee's stockholders and their request for judicial aid to retain those benefits should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

V.

HOMER H. JOHNSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES

DON W. STEWART,
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Of Counsel

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STATEMENT

Respondent agrees in general with the views expressed in the brief filed for the United States by the Solicitor General and by the Counsel for the Federal Communications Commission and in particular with the unequivocal and logical statement that the state court has jurisdiction over the physical properties of the station. Such has been the view of the Commission for many years as shown in the decisions cited by the United States (pp. 7-11). Likewise that is exactly the position always taken by respondent and it is also the position taken by petitioners until after the decision in the court below. Then when confronted with an adverse judgment, the petitioners completely reversed their position and for the first time asserted that the state court had no jurisdiction over the physical properties of the station or over any issue in the case.

The Solicitor General and the Counsel for the Commission have made a commendable effort to formulate a procedure which will preserve the interests of the parties and the listening public in the continued operation of this station. Respondent recognizes the desirabilty of not interrupting the operation of the station but believes that such a result may be accomplished without staying the entry of final judgment in the state court.

Respondent's position may be summarized as follows:

1. The judgment should be construed to require the approval of the Commission to the transfer of the license to the Society as stated in the second opinion of the court below.

2. Even if the judgment is not construed in accordance with the views expressed in the second opinion, it

should not be modified without first giving the court below an opportunity to make the correction of what was, at most, a technical oversight.

3. Subject to the approval of the Commission, the judgment properly directs the petitioners to do all things necessary for the return of the license to the Society and lessee should not be permitted to oppose such return.

4. The judgment should not be construed as attempting to force the Society to operate the station.

5. The judgment in the court below need not be stayed in order to preserve the interests of all parties and the public by keeping the physical properties and the license together as suggested by the United States.

6. The station should be valued as a going concern and should include not only physical property but also good will.

These points will now be discussed under appropriate headings.

ARGUMENT

1. The Judgment Should Be Construed to Require the Approval of the Commission to the Transfer of the License to the Society as Stated in the Second Opinion of the Court Below

The United States in its brief states (p. 12) that the judgment should be vacated insofar as it attempts to set aside the transfer of the license and order its return to the Society. Respondent believes the judgment should be construed to require the approval of the Commission to a transfer of the license and when so construed it properly requires the parties to do all things necessary for the pur-

pose. It is true that the judgment orders that the transfer of the license be vacated, the license returned to the Society and the lessee directed to do all things necessary for that purpose (R. 745) and the judgment was not modified when the motions for a rehearing were denied (R. 794). However, the opinion filed in connection with the denial of those motions specifically states (R. 797):

> "the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed."

Again it says (R. 798):

> "this court has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter exclusively within the granted power of the commission, * * * Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion."

While the court below in its second opinion did not specifically state that its judgment was being modified, yet that was apparently the intention of the court. The language in its first opinion relating to the transfer of the license (R. 761) is in all material respects the identical language found in the judgment (R. 745). Therefore, the construction placed on that language in the second opinion should be applied to the same language as used in the judgment. The fact that the court did not formally modify its judgment when its intention is so clearly expressed in its second opinion should not require this court to modify the judgment.

This court in *Hotel & Restaurant Employees International Alliance* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 440 441, apparently gave effect to the con-

struction of an order by a state court. This construction was contained in an explanatory opinion denying a rehearing just as in the present case.

It would therefore appear proper and reasonable to apply the construction contained in the second opinion to the same language used in the judgment.

2. Even If the Judgment is not Construed in Accordance with the Views Expressed in the Second Opinion, It Should not be Vacated or Modified without First Giving the Court Below an Opportunity to Make the Correction of What Was at Most a Technical Oversight

It is clear from the second opinion that the court intended its directions as to the license were to be subject to the approval of the Commission. The fact that the judgment was not specifically modified accordingly was, at most, a mere technical oversight. If this court believes it should be corrected it would seem that the court below should first be given an opportunity to make that correction rather than for this court to either vacate the judgment or to modify that portion relating to the license by making it subject to the approval of the Commission.

3. Subject to the Approval of the Commission, the Judgment Properly Directs the Petitioners to do all Things Necessary for the Return of the License to the Society and Lessee Should not be Permitted to Oppose Such Return

The United States suggests (p. 13) that the judgment prevents the lessee from opposing the return of the license

to the Society and from applying for a new license to operate a station in Omaha on the same frequency should it become equipped to do so. The judgment is correct in that respect. It would certainly not be proper to permit the lessee to attempt to prevent the Society from securing a return of all that it lost through this fraudulent transaction. It is, of course, obvious that the physical property is more valuable when it is being operated as a going business and the Society could not so operate it if its license and wave length were retained by the lessee. If the Commission permitted the lessee to retain the license and wave length, it would in effect be condoning the fraud of petitioners. To permit lessee to retain the license and wave length which are necessary to the operation of the station by the Society as it was operated prior to the lease would be most inequitable and unfair to the Society and result in irreparable damage to it.

4. The Judgment Should not be Construed as Attempting to Force the Society to Operate the Station

The United States suggests (p. 13) that "the state court may not require the Society to come before the Commission and apply for authority to operate a broadcasting station if the Society" does not want to operate one. The respondent does not believe that the opinion justifies that construction. What the court below attempted to do was to place the parties in the position they occupied before the lease was made. That is the proper procedure when a fraudulent transaction is set aside. The Society, however, is not forced to operate the station and it can make some other proper disposition with the approval of the Commission. It can ask the Commission to approve the re-assignment of the license to

it and also approve the assignment of the license by it to another lessee or to a purchaser of the station.

5. The Judgment in the Court Below Need not be Stayed in Order to Preserve the Interests of all Parties and the Public by Keeping the Physical Properties and the License Together

We agree with the United States (p. 15) that the physical properties and the license should be kept together in order to preserve the interests of all parties and also the listening public. However, we do not believe this requires "a stay of final judgment in the court below until the Commission has had an opportunity to pass upon an application for the transfer of the broadcasting license" as suggested by the United States (p. 14).

The final judgment in this case should not depend on the disposition made of the station by the Society. If this court affirms the judgment or even if it modifies the judgment to conform to the second opinion, the court below will then remand the case to the trial court for a hearing on the accounting and other matters mentioned in the judgment (R. 745). The time which will necessarily intervene between the decision of this court and the hearing in the trial court should provide sufficient opportunity for the petitioners to apply to the Commission for consent to the assignment of the station license to the Society. If the Society still wishes to dispose of the station, or in any event, if the Commission believes the Society should dispose of the station, then the Commission could fix a reasonable time in which the Society should make such disposition. Surely the Commission in fulfilling its duty to protect the interest of the listening public would co-

operate in thus continuing the operation of the station until the Society has a reasonable opportunity to dispose of it.

If before a final decree should be entered by the trial court, the Society made some disposition of the station and license, subject to the approval of the Commission, then the parties could submit the transaction to the trial court for approval. But we believe many difficulties might arise if the entry of a final decree in this case by the trial court was ordered deferred until the court and the Commission approved a disposition of the station and license. If necessary, the trial court could allow a reasonable time within which the consent of the Commission might be obtained to a transfer of the license and could retain jurisdiction to pass upon any disposition of the station by the Society, but the decree should be final as to all other matters.

6. The Station Should be Valued as a Going Concern and Should Include not only Physical Property but also Good Will

The United States discusses the value of the station and states (p. 16) that the value of the physical property of the station is worth not more than $175,000 and in footnote 3 it is said: "The cost of the physical equipment was $175,000." This statement was probably taken from petitioners' brief (p. 52) but the record cited (R. 581) does not support it. The reference to the cost of the equipment as being $175,000 was merely a part of a hypothetical question and not an answer (R. 581). The lease shows that in addition to the station equipment there was other property included (Ex. 1 to Answer, R. 21, 22). The Society spent $169,000 on equipment for the

station in 1935 (R. 451). The record does not appear to show the value of the physical property.[1]

Whatever the value of the physical properties may be, it would not determine the value of the station as a going concern. This court has frequently held in cases involving utilities that the standard for the value of such property is its value as a going concern. In *City of Omaha* v. *Omaha Water Company*, 218 U.S. 180, 202, it is said:

> "The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

The franchise mentioned would be similar to the license to operate the station.

In *Galveston Electric Company* v. *City of Galveston*, 258 U.S. 388, 396, it is said:

> "In determining the value of a business, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property."

---

[1]The Society was one of the plaintiffs in the suit to set aside the Chain Broadcasting Regulations promulgated by the Commission. National Broadcasting Company v. United States, 319 U. S. 190. In the record (p. 5) there appears in paragraph 14 the following allegation in the petition signed by the Society: "Station WOW, owned and operated by Woodmen as aforesaid, represents an investment by Woodmen in assets (other than good will) having a present value in excess of $175,000, and said Station WOW is a going concern which, during its 18 years of operation by Woodmen, has created values for Woodmen of over $500,000 in good will." The same statement appears on page 256 of that record in paragraph 3 of an affidavit by John J. Gillin, Jr., general manager of station WOW and one of the petitioners in the present case.

The opinions of the court below do not give any value to the license; in fact, the second opinion specifically states (R. 797):

> "Such a license is a permissive grant of a privilege and creates no fixed property right in the license."

It is true the value of the station is much less if it cannot be operated but the difference is not attributable to the license. The value of a packing company such as Armour's or Swift's would decline substantially if the government denied it a license to operate and yet it would hardly be logical to say that the difference in value represented the value of the government license. The license is simply one of the elements necessary to permit the business to operate and if it makes a profit from such operation the value of the business is greater than the value of its physical properties.

The United States recognizes (p. 17) that the value of the station includes good will and going concern value. So does the Commission and apparently Congress. See Appendix to brief for the United States (p. 27). Obviously the station's value would decline substantially if it were unable to continue operation because the license should terminate or for any other reason. It should be assumed, however, that the Commission will do all it reasonably can to permit the continued operation of this station which has such an excellent record, so that the listening public will not be deprived of its broadcasting service.

CONCLUSION

We believe the judgment of the court below should be construed to require the approval of the Commission to the transfer of the license to the Society and the judgment affirmed. If it is not so construed then the court below should be given opportunity to correct its judgment in accordance with the views expressed in its second opinion. We agree with the suggestion of the Solicitor General and Counsel for the Commission that it is desirable to keep the physical properties and the license together so that the operation of the station will not be interrupted. However, difficulties might arise if the trial court is directed to defer entry of a final decree until the court and Commission approved a disposition of the station and license. We believe it would be a more orderly procedure for the trial court to enter a final decree but retain jurisdiction to pass upon a subsequent disposition of the station if desired by the Society.

Respectfully submitted,

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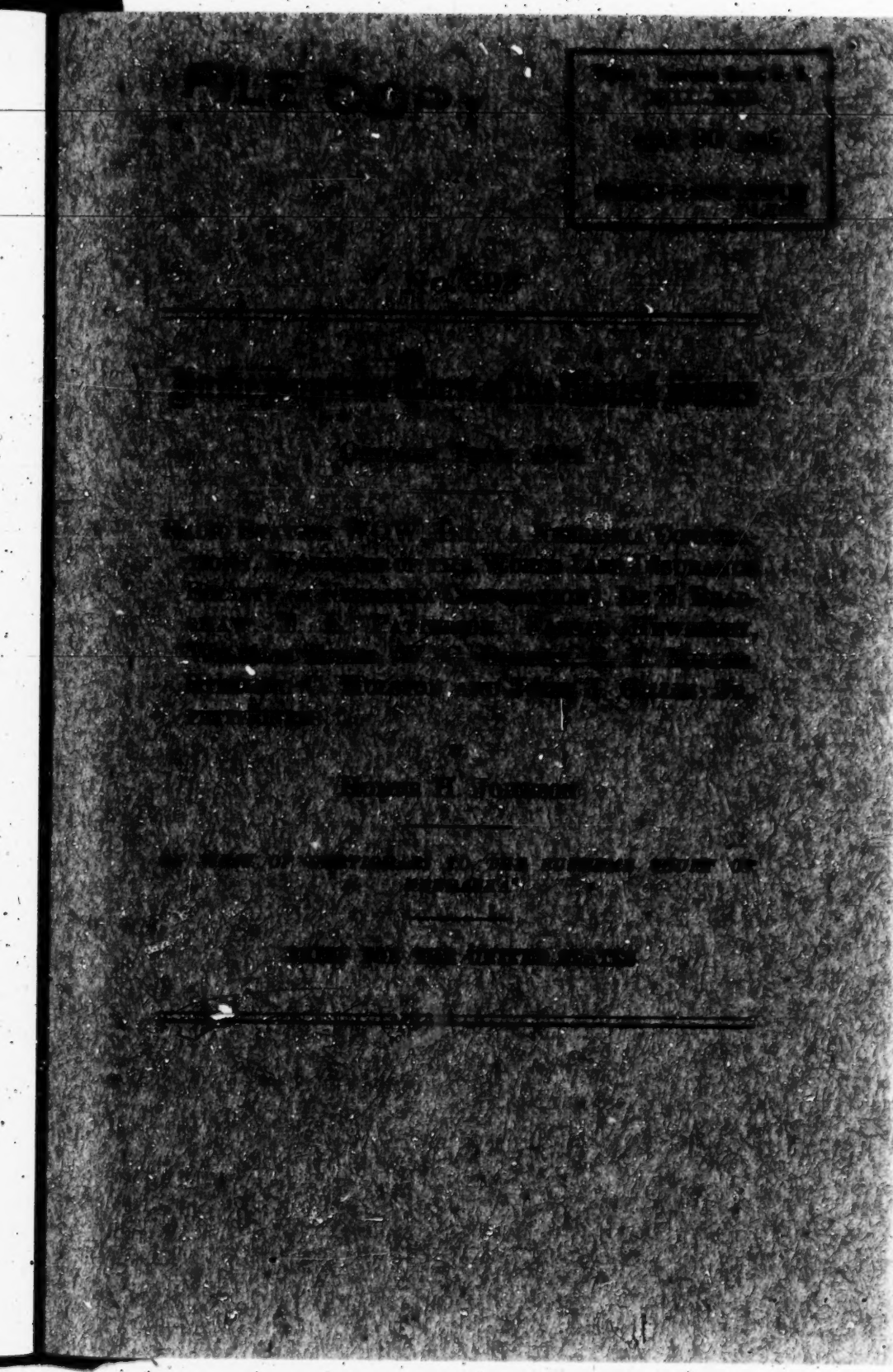

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 593

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

v.

HOMER H. JOHNSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE UNITED STATES

This brief is filed pursuant to the Court's request of March 8, 1945 that the Solicitor General, if so advised, file a brief in the present case dealing with "the question to what extent, if any, does the Federal Communications Act restrict the jurisdiction of the state court to give the relief which it has granted in this suit".

STATEMENT

Prior to January, 1943, Radio Station WOW in Omaha, Nebraska, was operated by its owner, the Woodmen of the World Life Insurance Society. The Society having determined that its activities should be confined to the insurance business and that it should divest itself of its radio interests, entered into an agreement dated October 3, 1942, providing for the lease of its radio station properties to Radio Station WOW, Inc., and for the transfer to the lessee of the broadcasting license for the station, issued to the Society by the Federal Communications Commission, provided the Commission should consent to the transfer as required by Section 310 (b) of the Communications Act of 1934, 47 U. S. C. Sec. 310 (b).[1] (R. 21–28.) On December 15, 1942, the Commission consented to the transfer (R. 660–661; Ex. 32, R. 662A) and afterward declined to extend the time limit upon its permission. (R. 664.)[2]

[1] Section 310 (b) provides:

"The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

[2] Failure to transfer the license within the time limited would have meant simply that another application would have been required for permission to transfer at a later date. Cf. *Donald J. Flamm*, 8 F. C. C. 225, 327.

The transfer was then consummated and the station has since been operated by Radio Station WOW, Inc.

Prior to the Commission's action the respondent, a member of Woodmen of The World Life Insurance Society, filed suit in the District Court of Douglas County, Nebraska, on behalf of himself and all other members of the Society, seeking to set aside the lease transaction on grounds of fraud and lack of authority on the part of the individual defendants as officers of the Society to enter into it. (R. 1–10.) The trial court entered a decree for the defendants, petitioners here. On appeal the Supreme Court of Nebraska reversed the decree of the district court (R. 745–761), three of the seven judges dissenting (R. 761–769). The court's judgment (R. 744–745), in addition to ordering the cancellation of the lease of the radio station, directed that "the transfer of the license to operate the station be vacated and set aside; * * * that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose * * *". The opinion of the court concludes that there was constructive fraud in the lease transaction, inferable from the terms of the transaction and the circumstances surrounding it. The Woodmen of the World Society, the court stated (R. 760), "obtained an extremely excessive reduction in its income" from the station as a

result of the lease, "without a complete disposition thereof". The court further found that the resources of the lessee corporation were inadequate to assure performance of its undertaking to provide new equipment as might be required by advances in the art of broadcasting (R. 759–760); that certain of the purposes which had been stated as grounds for the disposition of Station WOW by the Society would not be fulfilled under the terms of the lease (R. 760); and that the lease transaction was brought about in part by the desire of the president of the Society to effect an arrangement which would continue the previous manager of the station in control of its operations.

When the jurisdiction of the Federal Communications Commission was brought to the attention of the Supreme Court of Nebraska in a petition for rehearing (R. 775–781), that court entered a further opinion (R. 794–799) stating (R. 798) "* * * this court has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter exclusively within the granted powers of the commission. * * * Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion." The court, however, entered an order denying motions for rehearing (R. 794) and did not amend its original judgment.

ARGUMENT

I

THE NEBRASKA COURTS HAVE JURISDICTION TO ENTERTAIN THIS SUIT, AND THE JUDGMENT BELOW IN SO FAR AS IT DETERMINES MERELY THE DISPOSITION OF THE PHYSICAL PROPERTY OF THE RADIO STATION IS NOT AN INVASION OF THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION

Under Section 310 (b), *supra*, p. 2, the consent of the Federal Communications Commission is necessary for the transfer of a broadcasting license, but no permission is necessary from the Commission before the physical equipment of the station may be sold. Nothing in the Act leads to the conclusion that transactions involving the property used in radio broadcasting may not be dealt with legally in the ordinary courts of the land. Hence, if Radio Station WOW, Inc. had defaulted in its obligations to the Society under the lease here involved, suit might have been brought upon the contract in the state court. Similarly, a state court clearly has jurisdiction to foreclose a mortgage on the physical properties of a radio station in the event of a default. Station property may be sold for unpaid taxes in the same manner as other property. State probate courts have jurisdiction to determine title to radio properties upon the death of the owner. And if the owner of a station should through error as to his title build the station on another's land, the

landowner could bring an ejectment proceeding in the state court. In short, the formation and termination of broadcasting enterprises and the acquisition, encumbrance, and disposition of property used in broadcasting are subject to the laws which govern business enterprises and transactions generally.

The cases cited by petitioners (Br. 37) in support of the "principle at common law that property devoted to a public service will not be separated from the franchise it is necessary to effectuate" and of the proposition that "rights asserted against that property are subordinate to that principle in order to protect the public interest", all hold either that asserted liens or attachments are not applicable to public utility property or that equity may prevent the enforcement of a lien against such property if the sale of the property might force the abandonment of the public service to which it has been devoted. Even as respects utility property, applicable liens may be enforced if the public service is not thereby endangered. *Missouri-Kansas-Texas R. R.* v. *Mars*, 278 U. S. 258; *Davis* v. *Cleveland, C. C. & St. L. Ry.*, 217 U. S. 157; *Atchison, T. & S. F. Ry.* v. *Wells*, 265 U. S. 101. The fact that a steamship is engaged in interstate commerce does not render invalid an attachment upon it. *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511. A State may con-

demn a portion of a railroad line for non-transportation purposes, without reference to Federal authority. *Chicago, R. I. & Gulf Ry. Co.* v. *Tarrant County W. C. & I. Dist.* (Tex. Civ. App.), 76 S. W. 2d 147, certiorari denied, 295 U. S. 762. Conversely, a permissive order of a regulatory agency does not deprive the courts of jurisdiction with reference to property or contracts or legal obligations which the order may incidentally affect but which were not before the agency for consideration. *Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415; cf. *N. Y. Central Securities Corp.* v. *United States*, 287 U. S. 12, 26–27. By a parity of reasoning, it seems clear that the courts have jurisdiction with reference to the physical property of radio stations notwithstanding the licenses issued by the Commission.

Nor is a court which has jurisdiction deprived of power to render a judgment with respect to the property of a radio station merely because the effect may be to shut off broadcasting by the station. The Communications Act contains no provision for the continuance of broadcasting until permission to abandon service is obtained, such as frequently appears in statutes which regulate public utilities. Cf. *Warren* v. *Palmer*, 310 U. S. 132, 137–138; *Re Boston, Revere Beach & Lynn R. Co.*, 31 P. U. R. (N. S.) 257 (Mass.

Dept. of Public Utilities, 1939); Section 214 of the Communications Act, 47 U. S. C. Sec. 214, affecting carriers by wire or radio. On the contrary, Section 3 (h) of the Act, 47 U. S. C. Sec. 153 (h), as this Court recognized in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474–475, provides expressly that broadcasting stations are not common carriers. Section 3.71 of the Commission's Rules and Regulations, 47 C. F. R. (Cum. Supp., 1943) Sec. 3.71, prescribes a minimum operating schedule for radio stations and sets forth a procedure whereby stations may secure permission to cease operation for a limited period of time while retaining their licenses; but this regulation does not prevent a licensee from ceasing operation either voluntarily or under legal compulsion, with consequent loss of the broadcasting license.

We believe, therefore, that no sound basis exists for petitioners' contention that the courts of Nebraska were without jurisdiction of the subject matter of the present suit and without power to enter a judgment after appropriate proceedings. The Federal Communications Commission is fully empowered to protect the public interest entrusted to it by Section 310 (b) of the Communications Act, *supra*, p. 2, in any proceeding for a transfer of the broadcasting license which may result from the disposition of the physical prop-

erty of Radio Station WOW by the judgment in this case. Its action with respect to the license will in no wise be foreclosed or governed by the judgment with regard to the property.

The Federal Communications Commission has consistently adhered to this view and has declined to assert authority with respect to the control of radio station property. In *M. A. Leese*, 5 F. C. C. 364, it appeared that the M. A. Leese Radio Corporation, which was formerly the licensee of Station WMAL, had previously assigned the station license with the consent of the Commission and had leased the physical property to the assignee, retaining title to the property in itself. Subsequently the stockholders of the Corporation agreed to sell their shares to the Evening Star Publishing Company. A petition was filed with the Commission requesting that the Commission either give its consent to the transfer of control of the corporation or declare that its consent was not necessary. The Commission held that consent was not necessary, saying (p. 365):

> Accordingly, upon consideration of the petition, the Commission is of the opinion and so finds that insofar as any sale or transfer of control of stock involving the physical equipment of radio Station WMAL is concerned, neither Section 310 (b) of the Communications Act of 1934, nor any other provision of that Act prohibits such transfer, nor does the Com-

> mission have jurisdiction with regard to the matters presented in said petition on the basis of the facts therein stated.

The same principle has recently been reiterated by the Commission in the case of *WMCA Inc.*, decided November 16, 1943 (Appendix, *infra* pp. 23–26). That case involved a transfer of the license of Station WMCA from WMCA, Inc. to Cosmopolitan Broadcasting Corporation. WMCA had formerly been owned by Flamm who had sold it to Noble, sole owner of WMCA, Inc. Subsequently Flamm brought suit in a New York State court, alleging that the sale to Noble was induced by fraud, duress, conspiracy, and undue influence and seeking rescission of the sale. Flamm petitioned the Commission for leave to intervene in connection with the subsequent application for transfer of the license from WMCA, Inc. to Cosmopolitan Broadcasting Corporation, pointing out that the suit was still pending and asking permission to show that the Commission should withhold action until it should be determined. The Commission denied the petition, saying:

> As a legal matter * * * petitioner's argument misconceives the respective jurisdictions of the Court and this Commission. On the one hand, the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and

other assets of Station WMCA. The Commission has no power to act with respect to these matters and any action it takes in the present proceedings will not affect the Court's jurisdiction.

On the other hand, the Commission has, under the Communications Act of 1934, as amended, exclusive jurisdiction to determine whether in any particular case, the license of Station WMCA to engage in radio broadcasting should be assigned in the public interest, convenience or necessity. Should petitioner prevail in his action, neither the Court nor Noble, acting pursuant to its order, has power to restore the license of Station WMCA to him without consent of the Commission. Commission consent to the proposed assignment, therefore, does not affect any remedy which it is within the Court's power to afford.

See also *Hearst Radio, Inc.*, 7 F. C. C. 292; *City of Atlantic City*, 7 F. C. C. 485; *Buffalo Broadcasting Corp.*, 9 F. C. C. 31.

As respects jurisdiction over the physical property of Station WOW, the situation is essentially the same in the present case. This fact does not, however, deprive this Court of jurisdiction and require dismissal of the cause if, as we shall contend, the judgment of the Supreme Court of Nebraska invaded the statutory authority of the Federal Communications Commission in certain respects.

II

THE STATE COURT HAD NO POWER TO ORDER A RETURN OF THE FEDERAL BROADCASTING LICENSE OR TO DIRECT THE PARTIES WITH REFERENCE THERETO

The judgment of the court below goes beyond a cancellation of the lease of Radio Station WOW and a provision for the return of the station's property to the Woodmen of the World Society. It attempts also to set aside the previous transfer of the broadcasting license, to order its return, and to compel the parties "to do all things necessary for that purpose". In these respects it goes too far and should, we believe, be set aside with directions to eliminate all provisions which purport to control the disposition of the license or to direct the parties with reference thereto.

The court below recognized in its opinion upon rehearing (R. 798) that the portion of its judgment ordering a return of the license invades the jurisdiction of the Federal Communications Commission under Section 310 (b) of the Act, *supra*, p. 2. However the court did not amend its judgment except in so far as its opinion on rehearing may be deemed to do so. The fact that this opinion also states (R. 799) that the court's prior opinion is adhered to leaves substantial doubt as to the precise requirements of the court's judgment. It is important that the judgment itself should clearly and accurately reflect

the respective jurisdictions of the state court and the Federal Communications Commission.

We believe, also, that the court may not attempt to control the action of the parties with respect to the Federal broadcasting license. Under the Communications Act of 1934 it is the responsibility of the Commission to grant or withhold broadcasting licenses in the public interest. The Commission's jurisdiction is invaded by a judgment which has the effect of preventing the petitioner Radio Station WOW, Inc., from opposing a return of the license to the Woodmen of the World Society, if it should so desire, and of disqualifying it, as the court's judgment probably does, from applying for a new license to operate a radio station in Omaha on the same frequency, should it become equipped to do so.

Similarly, the state court may not require the Society to come before the Commission and apply for authority to operate a broadcasting station if the Society, as this record indicates may be the case (R. 14-16, 287, 316), desires to confine its activities to the life insurance business. Such a requirement would force the Society into an anomalous position before the Commission and interfere with the Commission's ascertainment of the facts necessary for it to discharge its functions, which include ascertainment of the qualifications of an applicant to operate the station in question. The state court, we believe, may not properly go beyond attempting to create a situa-

tion in which an applicant may submit himself to the Commission in a proceeding to secure its consent to a transfer of the license, under an arrangement which will secure the interest of the Society under state law, although it may, of course, require the respondents who are officers of the Society to take steps to effect such an arrangement.

III

THE NEED FOR A PRACTICAL ADJUSTMENT OF THE STATE COURT'S JURISDICTION OVER THE PHYSICAL PROPERTY TO THE FEDERAL COMMUNICATIONS COMMISSION'S JURISDICTION WITH RESPECT TO THE BROADCASTING LICENSE SUGGESTS THAT THE COURT BELOW SHOULD STAY ITS JUDGMENT UNTIL THE COMMISSION HAS PASSED UPON AN APPLICATION FOR A TRANSFER OF THE LICENSE

Since, as we contend, the judgment below must be vacated, it may be pertinent to discuss certain aspects of the parallel jurisdictions of courts and the Federal Communications Commission which appear to have been overlooked by the court below and which should receive consideration in the disposition of this case. These should, we believe, lead to a stay of final judgment in the court below until the Commission has had an opportunity to pass upon an application for the transfer of the broadcasting license, growing out of these proceedings.

The court below, in seeking to undo the effects of the lease which it has found to be invalid, at-

tempts to secure to the Woodmen of the World Society the economic benefit which it enjoyed before from its ownership of Radio Station WOW. This is impossible unless the Federal Communications Commission consents to a disposition of the broadcasting license which is consistent with this end; for the station as an economic entity includes the license, and the major part of its value depends upon the license. Even the physical property is worth much more as an operating unit than as salvage. Nevertheless the judgment below is absolute. The court recognizes in its opinion upon rehearing that the Society as owner of the station may be deprived of much of the benefit of ownership if the Commission should decline to permit a restoration of the license to it. The risk of loss of an operating license is, it states correctly, one of the risks which all owners of broadcasting property must incur. (R. 797.) The hazard to station proprietors which springs from the existence of parallel jurisdictions over radio broadcasting is, however, one which may be minimized by resorting to those "resources of flexibility" of the judicial process to which this Court recently adverted in a situation calling for an accommodation between the necessities of adjudication and the requirements of preserving a statutory administrative authority. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 622. The performance of the Commission's functions

would also be aided by a conscious furtherance of harmony between its decisions and those of the courts, which, although possibly "difficult of attainment when jurisdiction is divided" (*Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.*, 297 U. S. 500, 513), may nevertheless be attempted; for, as we shall show, the action of the court in this case has a significant practical bearing upon the Commission's attainment of its statutory purposes.

Not only may the judgment in this case result in the public's loss of broadcasting services by Radio Station WOW for at least a period of time if the Commission declines to consent to a return of the license to the Woodmen of the World Society, but the grounds of the judgment as expressed in the court's opinion, together with the judgment itself, will bear upon the Commission's exercise of the authority committed to it by the Communications Act. The physical property of the station, over which alone the court claims jurisdiction, is worth not more than $175,000.[3] The radio station, which includes the physical property, the license, and the good will and going concern value, was leased by the Society to Radio Station WOW, Inc. for a fifteen year term under an agreement which the court found provided an

[3] The cost of the physical equipment was $175,000. It was stated at the trial to have been completely amortized (R. 581).

average net rental of $74,000 per year. This the court held to be inadequate (R. 756). Capitalizing this figure (cf. R. 513) produces a value of approximately $1,000,000, attributable largely to intangible elements such as good will, going concern value, and an expectancy that the license will be continued, which would cease with a termination of the license.

The opinion of the court stresses factors which must enter into the Commission's consideration of an application by the Society for a return of the broadcasting license, notably the obligations to the Society of the officers who would be responsible for the conduct of the station.[4] The Commission's decision, in turn, if it could be known before the court gave final form to the discretionary decree which is appropriate in an equity proceeding, would obviously have a bearing upon the relief to be incorporated into the decree. A mutual accommodation of the decisions of court and Commission would contribute materially to the smooth

[4] The fiduciary obligations of a proposed station operator obviously are a factor to be weighed by the Commission in determining whether the broadcasting will be conducted in accordance with the public interest. We put to one side the question, scarcely determinable upon this record, whether the Commission may take account of the consideration paid for a station or the value which the operator would attribute to it, in passing upon an application for the issuance or transfer of a license. The Commission's practice on this point has not been uniform. Compare *Western Broadcast Company*, 3 F. C. C. 179, and

operation of the regulatory scheme established by Congress and to the attainment of the objects of state law.

Seitz et al., 7 F. C. C. 315 with *Jackman et al.*, 5 F. C. C. 496, and *Travelers Broadcasting Service Corp.*, 6 F. C. C. 456, 7 F. C. C. 504. The latest declaration of the Commission's practice in this matter is contained in a letter dated July 24, 1944 from the Chairman of the Commission to the chairmen of the Senate Interstate Commerce Committee and the House Interstate and Foreign Commerce Committee, in which it is stated that "the statute does make clear that the frequencies are not in any way the property of the licensees. The Commission has rejected and is prepared to reject any transfer which on its face involves a consideration for the frequency" but "has approved transfers that involve going-concern values, good will, etc." The letter states further that there is a serious question of policy upon which "the law is not clear, as to whether the Commission should approve a transfer wherein the amount of the consideration is over and beyond any amount which can be reasonably allocated to physical values plus going-concern and good will, even though the written record does not itself show an allocation of a sum for the frenquency." The letter calls attention to "the tremendously high prices which radio stations are commanding in the present state of the market" and continues that "under the present state of the law * * * it is not clear that the Commission has either the duty or the power to disapprove of a transfer merely because the price is inordinately high—even though it may well be deduced that a substantial value is placed on the frequency." The letter concludes that "in the absence of a clear Congressional policy on this subject" it was thought best to draw the matter to the attention of the appropriate Congressional committees.

On July 26, 1944, Commissioner Clifford J. Durr announced his dissent from the action of the Commission on July 18 in approving certain license transfers without hearing and stated his opinion, that, if the Commission were to

We do not contend that the state court is without authority to proceed immediately to enter an amended final decree if it wishes to do so; but we believe that this Court may appropriately point out the undesirability of such a conclusion to this litigation. Congress has not here, as it has with respect to other judicial proceedings affecting a public interest entrusted to regulatory agencies (cf. Sec. 1 of the Chandler Act, 11 U. S. C. Secs. 577, 578) provided for the submission of proposals through the courts to the appropriate administrative authority. This fact, however, need not prevent voluntary resort to a similar procedure, see *Hudson River R. Dist.* v. *F., J. & S. R. R. Co.*, 249 N. Y. 445, 454–455, which would operate upon the same principles as in the end were found to apply in the proceedings reviewed in *Atchison, Topeka & S. F. Ry. Co.* v. *Railroad Comm.*, 283 U. S. 380, and *State* v. *Atlantic Coast Line R. Co.*, 103 Fla. 1204, certiorari denied, 286 U. S. 557, but would operate much more smoothly and expeditiously in the absence of disputes as to jurisdiction. In this field, judicial and adminis-

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secure full information by means of hearings, it might conclude that "capitalization of licenses" contrary to the public interest was occurring and should be considered.

Both of the above documents are printed in full in the Appendix, *infra*, pp. 26–33.

As to the intended effect of the relevant Communications Act provisions see the discussions in Congress during the consideration of the Radio Act of 1927, which has become Title III of the present Act, at 68 Cong. Rec. 2573–2574, 2578–2579, 2869–2882, 4150–4153.

trative, state and national, authority should be correlative rather than competitive in operation, with resulting benefit to both.

The doctrine of primary jurisdiction as it has evolved (cf. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 139) suggests the procedural device to be recommended. Initially the doctrine involved situations in which a court, whether state or Federal, was said to be without jurisdiction because the entire question at issue was in the first instance one for administrative determination. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426; *St. Louis, etc. Ry. Co.* v. *Brownsville Nav. District,* 304 U. S. 295; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Terminal Warehouse Co.* v. *Pennsylvania R. R. Co.,* 297 U. S. 500; *U. S. Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. In *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, it was held that, although "The court [in a contract action] had jurisdiction of the subject matter and of the parties" (p. 432) and "should not" dismiss the cause (p. 433), it "should have stayed its hand pending the [Interstate Commerce] Commission's determination" (p. 433), in a proceeding to be begun, of a question upon which the plaintiff's right of recovery turned.

In the present case the respondent's right of recovery does not turn upon the Commission's action with regard to the broadcasting license; but the provisions of the court's final decree may well

be shaped in part, with benefit to all affected interests, by what the Commission says and does with respect to the license if it is afforded an opportunity.

The Supreme Court of Nebraska should, we believe, hold its judgment in abeyance for a reasonable time, pending a determination of the course to be followed. The Woodmen of the World Society presumably may choose whether it will seek to resume operation of the station itself or attempt to sell it to the same or to a different party upon terms which are consistent with state law. Whatever operation may be decided upon—whether by the Society, by Radio Station WOW, Inc. pursuant to a new contract, or by a third party—may then, after approval by the court, be submitted to the Commission in a proceeding for transfer of the license. If the Commission finds the proposed operation to be in the public interest it will give its consent, and the state court may then enter an appropriate order with respect to the physical property, thus consummating an arrangement approved both by the Commission and by the court. If the Commission withholds consent, adjustments may be made which will result in a proposal that is acceptable. In this way the physical property and the broadcasting license can be kept together and the interest of all parties and of the public be preserved.

CONCLUSION

We respectfully suggest to the Court that it remand this proceeding with recommendations for the further proceedings just outlined, but ask that, in any event, it require the modifications in the judgment of the Supreme Court of Nebraska which are urged in Point II of the Argument herein.

CHARLES FAHY,
Solicitor General.
RALPH F. FUCHS,
Department of Justice.

CHARLES R. DENNY,
General Counsel,

HARRY M. PLOTKIN,
Assistant General Counsel,
Federal Communications Commission.

MARCH 1945

APPENDIX

Decision and Order of the Federal Communications Commission

File No. B1-AL-390

In re: Application for consent to the assignment of license of Station WMCA, New York, N. Y., from WMCA, Inc. to Cosmopolitan Broadcasting Corporation

The present proceeding involves application for consent to the assignment of license of Station WMCA, New York, N. Y., held by WMCA, Incorporated, wholly owned by Edward J. Noble of New York City, to Cosmopolitan Broadcasting Corporation. Nathan Straus of New York City, and Davega-City Radio Incorporated own approximately 59% and 41%, respectively, of the voting stock of Cosmopolitan Broadcasting Corporation. The Commission finds that Cosmopolitan Broadcasting Corporation is legally, financially, and technically qualified to operate Station WMCA and that the proposed assignment is in the public interest. Accordingly, the Commission consents to the assignment.

Donald Flamm of New York City has petitioned for permission to intervene in the proceedings. The petition alleges that on or about August 10, 1943, he commenced an action in the Supreme Court of the State of New York against Edward J. Noble seeking to rescind the sale of Station

WMCA theretofore made by him to Noble, on the ground that said sale was induced by fraud, duress, conspiracy and undue influence; and prays for permission to intervene in order to show that the Commission should withhold action in the present proceeding until the pending suit "shall have been tried and it shall have been determined whether or not Donald Flamm is entitled to the rescission" of the sale. It appears from the petition that there has been no trial on the merits, that the court has denied an injunction against transfer of Station WMCA by Noble pending determination of the action, and that an appeal from the order of denial is pending.

Petitioner, Donald Flamm, for sometime prior to 1941 was sole stockholder of Knickerbocker Broadcasting Company, Inc., licensee of Station WMCA. Pursuant to application by Flamm and Noble, the Commission, on December 17, 1940, granted its consent to transfer of control of the licensee by the sale of all its outstanding stock to Noble. Thereafter, on December 23, 1940, Flamm filed a petition seeking to have the Commission reconsider its action and dismiss the application for transfer of control. The Commission dismissed the petition on January 7, 1941, and Flamm thereafter, on January 17, 1941, transferred the stock to Noble.

The instant petition to intervene must be denied. The only claim set forth as a basis for intervention is that if the petitioner should prevail in his pending suit against Noble, and if the Court should order rescission as prayed, the Commission, by consenting to the assignment, will have disabled Noble from complying with the Court's

order and rendered its judgment of no force and effect. Basically, therefore, the petition to intervene is simply a request that the Commission refuse to consent to the assignment of license until a final judgment is rendered in the pending action; in practical effect petitioner seeks here the relief denied him by the Court's refusal of an injunction *pendente lite*.

As a legal matter, however, petitioner's argument misconceives the respective jurisdictions of the Court and this Commission. On the one hand, the Court has exclusive jurisdiction to decide the issues involved in the pending litigation and to grant any relief to which petitioner may be entitled with respect to the physical properties and other assets of Station WMCA. The Commission has no power to act with respect to these matters and any action it takes in the present proceedings will not affect the Court's jurisdiction.

On the other hand, the Commission has, under the Communications Act of 1934, as amended, exclusive jurisdiction to determine whether, in any particular case, the license of Station WMCA to engage in radio broadcasting should be assigned in the public interest, convenience or necessity. Should petitioner prevail in his action, neither the Court nor Noble, acting pursuant to its order, has power to restore the license of Station WMCA to him without consent of the Commission. Commission consent to the proposed assignment, therefore, does not affect any remedy which it is within the Court's power to afford.

The petition has a final defect. It seeks to make action in the public interest wait upon the righting of an alleged private injury. The Commis-

sion has found that the proposed assignee is fully qualified to operate Station WMCA in the public interest. No fact which petitioner proposes to establish will in any way reflect upon the desirability of a transfer to the proposed licensee. Consummation of the transfer is not to be held up, perhaps for years, pending the settlement of issues in private litigation unrelated to the proposed operation. Especially compelling in the present case is the fact that Noble, in addition to being sole stockholder of the licensee of Station WMCA, is also the sole stockholder of American Broadcasting System, Inc. (Blue Network), licensee of a 50 kilowatt station (WJZ) which is located in New York City and serves substantially the area served by Station WMCA. Public interest expressed in Rule 3.106 against such multiple ownership will, therefore, be directly served by the proposed assignment.

Accordingly, it is ordered, this 16th day of November, 1943, that the application for consent to assignment of the license of Station WMCA (B1–AL–390) to Cosmopolitan Broadcasting Corporation be, and it is hereby, granted, and the intervention petition of Donald Flamm be, and it is hereby, denied.

TEXT OF LETTER FROM CHAIRMAN OF FEDERAL COMMUNICATIONS COMMISSION TO CHAIRMEN OF HOUSE AND SENATE INTERSTATE COMMERCE COMMITTEES

JULY 24, 1944.

DEAR ———: I hand you herewith a statement giving specific data on sales of radio broadcasting stations which have come before the Commission

during the calendar year 1944 to date. A number of these, and particularly several which were passed on at the Commission's meeting last week, involved a consideration overwhelmingly in excess of the physical value of the properties transferred, and it seems fair to deduce that the consideration in a number of the cases appears to go beyond any reasonable amount which could be assigned to the value of the physical properties plus good will, going-concern, etc. Data with respect to sales during earlier periods may be found in part in the Hearings before the House Committee on Appropriations on the Independent Offices Appropriation Bills (for 1945, following page 1286; for 1944, following page 1248; for 1943, following page 334; for 1942, following page 667 of Part I; for 1940, pocket supplement) and in part in the Congressional Record (86 Cong. Rec. 434; 83 Cong. Rec. 112 and 81 Cong. Rec. 786).

The Congress has had before it proposals to limit the amount of consideration to the value of the physical properties transferred but no provision of this character has been adopted. The statute does make clear that the frequencies are not in any way the property of the licensees. The Commission has rejected and is prepared to reject any transfer which on its face involves a consideration for the frequency. The Commission, apparently consistent with Congressional policy, has approved transfers that involve going-concern values, good will, etc. There remains, however, a serious question of policy and one on which the law is not clear, as to whether the Commission should approve a transfer wherein the amount of the consideration is over and beyond any amount

which can be reasonably allocated to physical values plus going-concern and good will, even though the written record does not itself show an allocation of a sum for the frequency. Our concern in this regard is heightened by the tremendously high prices which radio stations are commanding in the present state of the market. This is illustrated by the fact that one local station was sold for a half-million dollars and some regional stations are selling for a million or more.

It is the Commission's policy to disapprove of transfers which obviously represent the activities of a promoter or broker, who is simply acquiring licenses and trafficking in them. Under the present state of the law, however, it is not clear that the Commission has either the duty or the power to disapprove of a transfer merely because the price is inordinately high even though it may well be deduced that a substantial value is placed on the frequency. In the absence of a clear Congressional policy on this subject, we thought best to draw the matter to the attention of your own Committee and the Senate Committee on Interstate Commerce.

* * * * *

JAMES LAWRENCE FLY,
Chairman.

DISSENT OF COMMISSIONER DURR OF THE FEDERAL COMMUNICATIONS COMMISSION.

JULY 26, 1944.

Re: J. Leslie Doss, Transferor George Johnston, Transferee Bessemer, Alabama (WJLD).

Lawrence J. Heller, et al., Transferors Eugene Meyer and Agnes Meyer, d/b as The Washington Post, Transferees Washington, D. C. (WINX). John V. L. Hogan, Transferor New York Times Company, Transferee New York, N. Y. (WQXR and WQXQ).

My reason for voting against approval of the above assignments of license was the same in all three cases. The prices being paid for the stations seemed to me to raise serious questions of law and public interest, and I therefore think that each application should have been set for hearing to ascertain:

(a) Whether or not any part of the purchase price represents payment for a radio channel in violation of Sections 301 and 309 (b) of the Communications Act of 1934, as amended, and,

(b) Whether the amount being invested in the station by transferee will affect the operations of the station in the public interest.

Station WJLD, Bessemer, Alabama, is a 250-watt station operating on a local channel. The replacement cost of all its physical properties, real and personal, is only $12,269, and the original cost $12,019. The net worth of all of its assets, tangible and intangible, according to its books, is $14,236. For the year 1943, its net income before Federal taxes and without deduction of any salary for the proprietor was $4,966. The purchase price being paid is $106,000, which is more than *seven* times the net worth of the station and more than *twenty-one* times its net profits before Federal taxes.

Station WINX, Washington, D. C., is likewise a 250-watt station operating on a local channel, but operates with a booster which serves to extend its coverage. The replacement cost of all its physical properties, real and personal, is only $58,492, and the original cost $56,966. The net worth of all of its assets, tangible and intangible, according to its books, is $48,254. For the year 1943, its net income before Federal taxes was $20,186. The purchase price being paid is $500,000, which is more than *ten* times the net worth of the station and more than *twenty-four* times its net profits before taxes.

Station WJLD was first licensed only a little more than two years ago and Station WINX less than four-and-one-half years ago. The purchase price being paid for WJLD represents a profit of nearly 800 per cent on the cost of its physical properties and over 650 per cent on its net worth. The purchase price being paid for WINX represents a profit of nearly 800 per cent on the cost of its physical properties and over 950 per cent on its net worth.

Station WQXR, New York, N. Y., is a 10-kw station and WQXQ is a frequency modulation (FM) station. No figures were before the Commission as to the replacement cost or the original cost of the physical properties involved in the transfer. However, the net worth of all of the assets of the present licensee corporation, both tangible and intangible, is $227,037. For the year 1943, its net income before Federal taxes was $30,320. The purchase price being paid is approximately $1,000,000, which is approximately *four-and-one-half* times the net worth of the

licensee corporation and nearly *thirty-three* times its net profits before taxes.

Radio broadcasting is competitive and it is not the function of the Commission to protect either the buyers or the sellers of radio stations from the consequences of the exercise of their own business judgment. However, the Commission does have the responsibility of seeing to it that licensees observe the provisions of the Communications Act and that licenses for the operation of broadcasting stations are neither granted nor transferred unless the public interest will be served. Its responsibility in approving transfers is no less than its responsibility in making original grants of licenses. Section 310 (b) of the Act provides:

> The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, *after securing full information*, decide that said transfer is in the public interest, and shall give its consent in writing. [Italics supplies.]

Sections 301 and 309 (b) of the Communications Act provide clearly that radio channels are public property and incapable of private ownership. It follows that neither the channels nor any right to use them is for sale, either by private individuals or by the Government. The Communications Act provides that they are to be licensed by the Commission, only for limited periods of

time, and only to whose whom the Commission finds best qualified, by ability and intention, to use them in the public interest. Ability to outbid others in the price offered for a station has no relation to qualifications of this kind.

In each of the three transfers under consideration, the price being paid appears, on its face, to be greatly in excess of any demonstrated value of the properties and business being sold. For what is this excess being paid? Are there elements of value in the transferors' properties and businesses which are not apparent from the information contained in their applications, or are they selling something they do not own and have no right to sell, namely, the use of a radio channel? Moreover, the new licensees are taking on financial loads many times greater than those of the old licensees. All of these stations are commercial stations, and it is reasonable to assume that the purchaser of a commercial station buys with the expectation of earning at least a reasonable return on his investment. In the present cases, do the transferees regard their purchases as business ventures, or do they intend to operate the stations without regard to profit? If the former, how do they expect to operate the stations so that they will be self-sustaining and at the same time yield a fair business return on investments ranging from four-and-one-half to ten times the investments of the former licensees? Is it anticipated that profits will be increased through more economical and efficient operations or by increasing the price per unit of time sold, or is it contemplated that a substantial amount, if not all, of the

increased profits will have to come from selling more time? If more time is to be sold, will a reasonable amount of the free time still be left for local civic programs, educational programs, the discussion of controversial public issues, and other sustaining programs?

It seems to me that the applications, on their face, point to the need of "securing full information" before the Commission can decide that the transfers are in the public interest.

Far from the least important feature of our American broadcasting system is that the cost of establishing and operating radio stations has been within the reach of qualified individuals and groups having only moderate financial means. In many communities, all presently available standard radio channels are occupied and the only way for a newcomer to get into the field is by the purchase of an existing station. The present inflationary trend in the price of radio stations, if continued, will tend not only to increase still further the already tremendous pressure on sustaining programs but also to push radio broadcasting more and more beyond the reach of any but the well-to-do. Certainly the inflationary trend should not be encouraged by permitting the capitalization of licenses.

C. J. DURR,
Commissioner.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES.

No. 593.—October Term, 1944.

Radio Station WOW, Inc. (a Nebraska Corporation), Woodmen of the World Life Insurance Society (a Nebraska Corporation), De E. Bradshaw, et al., Petitioners,
vs.
Homer H. Johnson.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[June 18, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case concerns the relation of the Federal Communications Act, 48 Stat. 1064, 47 U. S. C. §151 *et seq.*, to the power of a State to adjudicate conflicting claims to the property used by a licensed radio station. At the outset, however, our right to review the decision below is seriously challenged.

The facts relevant to the jurisdictional problem as well as to the main issues are these, summarized as briefly as accuracy permits. Petitioner, Woodmen of the World Life Insurance Society, a fraternal benefit association of Nebraska, owns radio station WOW. The Society leased this station for fifteen years to petitioner, Radio Station WOW, Inc., a Nebraska corporation formed to operate the station as lessee. After the Society and the lessee had jointly applied to the Federal Communications Commission for consent to transfer the station license, Johnson, the respondent, a member of the Society, filed this suit to have the lease and the assignment of the license set aside for fraud. While this suit was pending, the Federal Communications Commission consented to assignment of the license, and the Society transferred both the station properties and the license to the lessee. Thereafter the Society answered that "the Federal Communications Commission . . . has and concedes that it has no jurisdiction over the subject matter of plaintiff's action, except jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer

of said license to the defendant Radio Station WOW, Inc. and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found". Respondent's reply admitted "that the Federal Communications Commission has and concedes that it has no jurisdiction over the subject matter of plaintiff's action except jurisdiction to determine the transfer of the license to operate said radio station." The trial court found no fraud and dismissed the suit.

The Supreme Court of Nebraska, three Judges dissenting, reversed and entered judgment for respondent, directing that the lease and license be set aside and that the original position of the parties be restored as nearly as possible. 144 Neb. 406, 13 N. W. 2d 556. The judgment further ordered that an accounting be had of the operation of the station by the lessee since it came into its possession and that the income less operating expenses be returned to the Society.[1] On motions for rehearing, the petitioners asserted that only the Federal Communications Commission and the federal courts had jurisdiction over the subject matter, not the Nebraska courts. These motions were denied in an opinion in which the Nebraska Supreme Court stated, "We conclude at the outset that the power to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission. . . . The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal

[1] The judgment directed "that said judgment of the district court be, and hereby is, reversed and cause is remanded, with directions that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside; that the $25,000 of accounts turned over by the society to lessee be returned; that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society; that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to the entering into the lease; that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning same to the society pursuant hereto are to be paid by the lessee. It is further ordered and adjudged that all costs, both in this court and in the district court shall be paid by the defendants, except the Woodmen of the World Life Insurance Society, costs in this court being taxed at $....; for all of which execution is hereby awarded, and that a mandate issue accordingly."

license being a question solely for the Federal Communications Commission. Our former opinion should be so construed." The claim that the Nebraska courts had no jurisdiction over the subject matter of the action was thus dealt with: "The fact that the property involved was used in a licensed business was an incident to the suit only. The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." 144 Neb. 432, 14 N. W. 2d 666. Because of the importance of the contention that the State court's decision had invaded the domain of the Federal Communications Commission, we granted certiorari. In the order allowing certiorari we directed attention to the questions whether the judgment is a final one and whether the federal questions raised by the petition for certiorari are properly presented by the record. 323 U. S. 705.

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. See *Heike* v. *United States*, 217 U. S. 423; *Cobbledick* v. *United States*, 309 U. S. 323; *Catlin* v. *United States*, 324 U. S. — (decided February 26, 1945). This requirement has the support of considerations, generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree". Section 237 of the Judicial Code, 28 U. S. C. § 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

But even so circumscribed a legal concept as appealable finality has a penumbral area. The problem of determining when a liti-

gation is concluded so as to be "final" to permit review here arises in this case because, as has been indicated, the Nebraska Supreme Court not only directed a transfer of property, but also ordered an accounting of profits from such property. Considerations of English usage as well as those of judicial policy would readily justify an interpretation of "final judgment" so as to preclude reviewability here where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State. Specifically, it might well be held that, even though definitive rulings on questions otherwise reviewable here have been made below, such rulings cannot be brought here for review if the State court calls for the ascertainment by a master or a lower State court of an account upon which a further decree is to be entered. See *California National Bank v. Stateler*, 171 U. S. 447, 449; Boskey, *Finality of State Court Judgments under the Federal Judicial Code* (1943) 43 Col. L. Rev. 1002, 1009; Robertson and Kirkham, Jurisdiction of the Supreme Court (1936) p. 58.

Unfortunately, however, the course of our jurisdictional history has not run as smoothly as such a mechanical rule would make it. To enforce it now, or to pronounce it for the future, would involve disregard of at least two controlling precedents, both of them expressing the views of unanimous courts and one of which has stood on our books for nearly a hundred years in an opinion carrying the authority, especially weighty in such matters, of Chief Justice Taney. Leaving to a footnote the details of a somewhat sinuous story,[2] it suffices to say that *Forgay* v. *Conrad*, 6

[2] Most of the cases cited which involve an accounting have come from federal courts. In this category are Forgay v. Conrad, 6 How. 201; Thomson v. Dean, 7 Wall. 342; Winthrop Iron Co. v. Meeker, 109 U. S. 180; Keystone Iron Co. v. Martin, 132 U. S. 91; McGourkey v. Toledo & Ohio Railway, 146 U. S. 536; Gulf Refining Co. v. U. S., 269 U. S. 125.

In the *Forgay* case the court below set aside a conveyance of land and slaves and ordered a master to take an accounting of the rents and profits. This Court held the decree to be appealable since immediate delivery of the property was ordered although the decree was "not final, in the strict, technical sense of that term". The Court said of the lower court judgment that "the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants". 6 How. 201, 204. It was suggested that if appellants had to wait, they would be subjected to irremediable injury, for execution had been awarded. Also held final was the decree in Thomson v. Dean, *supra*, where the court ordered immediate transfer of stock and an accounting to determine the amounts paid

How. 201, and *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, found the requirement of finality to be satisfied by judgments the characteristics of which cannot be distinguished from those presented by the Nebraska decree. In short, the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order. In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled. Compare *Clark* v. *Williard*, 292 U. S. 112, 117-119; and see Note (1934) 48 Harv. L. Rev. 302.

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and to be paid and the dividends accrued. In Gulf Refining Co. v. U. S., *supra*, a judgment was held to be final where the original decrees enjoined defendants from taking oil from Government property and confirmed an accounting to January 1, 1918, although the decree appealed from ordered a further accounting for oil extracted *pendente lite*. The Court observed that the decrees were final for the purpose of the original appeals. All of these cases rely on the fact that there had been a conclusive adjudication of the rights and liabilities of the parties with immediate delivery of possession of the subject matter of the suit. This consideration was emphasized in Grant v. Phoenix Ins. Co., 106 U. S. 429, 431-432, and in Collins v. Miller, 252 U. S. 364, 371.

Another line of cases starts with Winthrop Iron Co. v. Meeker, *supra*, where a decree was held final, although an accounting was ordered, because no accounting had been prayed for in the bill. This unsubstantial distinction was seized upon in Keystone Iron Co. v. Martin, *supra*, and in McGourkey v. Toledo & Ohio Railway, *supra*, to hold not final decrees in cases where an accounting had been sought.

The cases from State courts are less numerous. California National Bank v. Stateler, *supra*, stated broadly that a judgment remanding for an accounting is not final. In that case, an intervening party, appointed pursuant to State law as agent for bank stockholders, secured an order directing that money be turned over to him less the holder's costs, disbursements and attorney's fees. In addition, if it should be found that the holder had received certain stock as alleged then the stock also should be turned over. But there was no immediate delivery of anything since the amount of money to be turned over remained to be ascertained as did the existence of the stock. And in Sand Springs Home v. Naharkey, 299 U. S. 588, the Court denied certiorari "for the want of a final judgment" in a case where the plaintiff's right to an undivided one-sixth interest in land was decreed plus an accounting for profits from the gas taken out of the land. In the absence of a partition, there could of course be no delivery of the property itself.

Opposed to the general observations in the *Stateler* case is the square ruling in Carondelet Canal Co. v. Louisiana, 233 U. S. 362. The State Supreme Court ordered that judgment be entered requiring delivery of a canal to Louisiana. Certain claims with respect to a small additional plot of ground were reserved and an accounting of receipts and disbursements in the management of the property was ordered. This Court denied a motion to dismiss for want of a final judgment. It noted that the decree required immediate delivery of the property to the State so that the decree possessed definiteness as to the matter decided. "In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved.'" 233 U. S. 362, 372.

The presupposition in allowing such review is that the federal questions that could come here have been adjudicated by the State court, and that the accounting which remains to be taken could not remotely give rise to a federal question. Of course, where the remaining litigation may raise other federal questions that may later come here, such as is true of eminent domain cases, see *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews. Since, by awarding an execution, the Nebraska Supreme Court directed immediate possession of the property to be transferred, the case comes squarely within *Forgay* v. *Conrad, supra*, and *Carondelet Canal Co.* v. *Louisiana, supra*, and the challenge to our jurisdiction cannot be sustained.

This brings us to consider what federal questions are here. The court below decreed the transfer of property used as a radio station. It conceded that it had no jurisdiction over the transfer of the license under which WOW was operating. That is a matter which Congress has put in the keeping of the Federal Communications Commission. Petitioners claim that the court's decree in effect involves an exercise of the very authority which the court disavowed. This presents a federal question which was duly made below, and we must consider it.

But it is not open to us to consider independently the claim that the Federal Communications Act has withdrawn from the State court jurisdiction over the physical properties of the station and given it to the Federal Communications Commission. The Society's answer admitted that this controversy was outside the jurisdiction of the Commission except as it related to the transfer of the license, and respondent joined in this view. Only after the Nebraska Supreme Court's original opinion did petitioners, by motions to dismiss the suit and for rehearing, claim that the Nebraska courts were wholly without jurisdiction over the controversy. In its opinion on rehearing the Nebraska Supreme Court rejected this claim as "contrary to the pleadings filed" in the trial court, and also denied it on its merits. "The answer of the defendants, heretofore quoted," that court wrote, "squarely contradicts the position they now endeavor to assume. Their position is unsound on its merits and, in addition thereto, it was eliminated from the case by the pleadings they filed in their own behalf." Questions first presented to the highest State court on a petition for re-

hearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition. *Simmerman* v. *Nebraska*, 116 U. S. 54; *Godchaux Co.* v. *Estinopal*, 251 U. S. 179; *American Surety Co.* v. *Baldwin*, 287 U. S. 156. Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction." *Lynch* v. *New York*, 293 U. S. 52, 54-55. One of the petitioners, Radio Station WOW, Inc., seeks to avoid the force of this rule by suggesting that its answer did not make the concession as to the limited jurisdiction of the Federal Communications Commission upon which the Nebraska court relied. But it is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue. See *Neilson* v. *Lagow*, 12 How. 98, 109-111. It may be Nebraska practice that the answer of one defendant binds the others, or that failure to raise a question in the pleadings precludes its consideration on rehearing. These are matters of State law and not our concern. Cf. *Fair Haven R. R. Co.* v. *New Haven*, 203 U. S. 379, 386.

The federal question that remains is whether, although the Nebraska court clearly recognized that the power to vacate a license and to authorize its transfer lies exclusively with the Federal Communications Commission, its decree in effect is inconsistent with such recognition. This is urged on two grounds. It is asserted that the Nebraska Supreme Court, by ordering the transfer of the licensed facilities from Radio Station WOW, Inc. to the Society although not having power to direct the transfer of the license, severed the licensed facilities from the license and therefore nullified the license. Secondly, it is urged that by ordering the parties "to do all things necessary" to secure a return

of the license to the defrauded Society, the State court invaded the Commission's function.

The judgment, following the original opinion, ordered that "the transfer of the license to operate the station be vacated and set aside". On rehearing, the court made it quite plain that it was within the exclusive jurisdiction of the Communications Commission to vacate radio licenses and declared that its former opinion should be so construed. While it did not formally modify its judgment, it is reasonable to assume that the view which it unambiguously rejected in its opinion it did not mean to assert through its judgment. *Hotel Employees' Local* v. *Board*, 315 U. S. 437, 440-441; *Burke* v. *Unique Printing Co.*, 63 Neb. 264. But in matters of potential conflict between State and federal authorities, avoidance of needless friction no less than good draftsmanship counsels explicit and not merely argumentative restriction of a State court's judgment within its powers.

In any event, we think the court went outside its bounds when it ordered the parties "to do all things necessary" to secure a return of the license. Plainly that requires the Society to ask the Commission for a retransfer of the license to it and requires WOW not to oppose such transfer. The United States, in a brief filed at our request, suggests that this provision of the decree would probably also disqualify WOW from "applying for a new license to operate a radio station in Omaha on the same frequency, should it become equipped to do so." To be sure, the Communications Commission's power of granting, revoking and transferring licenses involves proper application of those criteria that determine "public convenience, interest, or necessity". Section 307(a), 48 Stat. 1064, 1083, 47 U. S. C. § 307(a). But insofar as the Nebraska decree orders the parties "to do all things necessary" to secure the return of the license, it hampers the freedom of the Society not to continue in broadcasting and to restrict itself, as it properly may, to its insurance business. Equally does it prevent WOW from opposing a return to the Society, or, as the United States suggests, from seeking another license of its own. These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of parties before the Communica-

tions Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.

The most troublesome question raised by this case remains. While the decree of the State court concerning the transfer of the leasehold is, in view of the pleadings, not here as an independent question, due consideration of the federal question relating to the transfer of the license makes it proper to consider the bearing of a decree ordering an immediate transfer of the leasehold upon the status of the radio license. A proper regard for the implications of the policy that permeates the Communications Act makes disposition of licensed facilities prior to action by the Communications Commission a subsidiary issue to the license question. We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW, and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The "public interest" with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud.

On the other hand, if the State's power over fraud can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, should be observed. Severence of the licensed facilities from the license so precipitously that the Federal Communications Commission is deprived of the opportunity of enabling the two to be kept together needlessly disables the Commission from protecting the public interest committed to its charge. This presents a practical and not a hypothetical situation. To carry out abruptly a State decree separating licensed facilities from the license

deprives the public of those advantages of broadcasting which presumably led the Commission to grant a license. To be sure, such a license is merely a permit to serve the public and not a duty to do so. Therefore, as we have concluded, the State has not been deprived by federal legislation of the practical power to terminate the broadcasting service by a proper adjudication separating the physical property from the license. We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station. Of course, the question of fraud adjudicated by the State court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties.

New situations call for new adaptation of judicial remedies. We have had occasion to limit the conceded jurisdiction of the federal courts in order to give State courts opportunity to pass authoritatively on State issues involved in federal litigation. See, *e. g., Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101. It will give full play both to the powers that belong to the States and to those that are entrusted to the Federal Communications Commission, where the two are intertwined as they are here, to enforce the accommodation we have formulated.

Accordingly, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice DOUGLAS concurs in the result.

Mr. Justice ROBERTS is of the opinion that the judgment should be affirmed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Mr. Justice JACKSON, dissenting.

I am unable to agree with the Court's disposition of this case and will indicate briefly the reason.

Petitioner is incorporated under the laws of Nebraska and operates a radio station owned by the Woodmen of the World, an insurance society also organized under the laws of Nebraska. It

is clear that the State of Nebraska has plenary power over the internal affairs of both of these corporations.

The Woodmen of the World, in addition to its insurance business, went into the radio business through radio station WOW. It became involved in controversies and eventually decided that it ought to get out of the radio operation.

From 1923 to 1928, it had carried the radio station at a loss but its net average earnings from 1936 to 1942 were $194,724.14 per year. The property and facilities of the corporation were leased to a new corporation in 1942 for $74,000.00 per year. The new corporation consisted of organizers whom the Court found sustained such a relation to the President of the insurance company who managed the negotiations on its behalf that the transfer constituted a constructive fraud on policy holders. It ordered that the transaction be undone and complete restitution be made. I take it that this judgment was fully within the competence of the State.

Meanwhile, the transferees had obtained approval of the Federal Communications Commission of the transfer of the license to them. Because of this, it is claimed that in some way the power of the State to undo this transaction is limited. Certainly no power has been conferred on the Federal Communications Commission to hear, try or determine the case of fraud between Nebraska stockholders and the officers of Nebraska corporations. The Commission has, of course, powers to look after the public interest in the transfer of stations.

There is possibility of conflict between the judgment rendered by the state court of Nebraska and the Federal Communications Commission and this possibility of conflict leads to the decision of the Court today. That conflict can occur only if the Federal Communications Commission shall hold that the federal public interest requires this radio station to be kept in the hands of those who are adjudged to be guilty of fraud and that the public interest cannot be served by those who have been adjudged to have been victims of that fraud although they had operated the station for many years with success and without any question as to the public interest. If the Communications Commission should render such a decision by refusing to retransfer the license in accordance with the judgment we would then have a question

as to the faith and credit due the state court judgment and its effects in an administrative tribunal. I would deal with that sort of question not hypothetically, but when it arises and upon the record which is made before the Communications Commission.

But even if the Commission should decide that the federal interest requires this station to be operated by those who have obtained it by constructive fraud, I think the judgment of the state court of Nebraska would still be good. It has the power not only to compel restitution of property obtained from its corporations in violation of its laws but if by federal proceedings or otherwise the wrong doers have put some part of the value of this station beyond their power to recapture, the State has the right to compel them to account for its value. The State, it seems to me, has the right to strip the wrongdoers of every fruit of the wrong including the value of the federal license even if the license itself cannot be obtained.

For these reasons, I would affirm the judgment of the Nebraska courts and leave the problem of conflict to be dealt with when and if it arises.